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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5269

ROBERT EDWARDS, Petitioner

v.

THE STATE OF ARIZONA, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE ARIZONA SUPREME COURT

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August 27, 1979

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No. _____

ROBERT EDWARDS, Petitioner,

vs.

STATE OF ARIZONA, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE ARIZONA SUPREME COURT

Petitioner, Robert Edwards, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Arizona Supreme Court entered in this proceeding on March 27, 1979.

OPINION BELOW

The opinion of the Arizona Supreme Court, reported at 594 P.2d 72, appears in Appendix A hereto.

JURISDICTION

The judgment of the Arizona Supreme Court was entered on March 27, 1979. It remanded the case to the trial court to resentence Petitioner on the murder conviction. The order is Appendix B to this Petition. A timely motion for rehearing was denied by the Arizona Supreme Court on May 2, 1979. That order is Appendix C to this Petition. On 18 July 1979, Mr. Justice Stevens entered an order under this Court's Docket No. A-48, extending the time for filing a petition for writ of certiorari to and including August 29, 1979. On July 20, 1979, the Pima County Superior Court entered its order, in its Case No. A-30683, setting aside

the sentence of death it had previously imposed upon Petitioner, and imposing a sentence of life imprisonment upon him. The order of the Superior Court of the State of Arizona in and for the County of Pima, is attached as Appendix B to this Petition. Petitioner's conviction and sentence having thereby become final, as has the opinion and order of the Arizona Supreme Court, the jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the Fifth, Sixth, and Fourteenth Amendments require suppression of a post-arrest confession, which was obtained after Edwards had invoked his right to consult counsel before further interrogation; which resulted from a jailhouse interrogation that Edwards objected to but was compelled to attend after being held in solitary confinement overnight; and where the interrogation was instigated by detectives who timed the questioning to occur just hours before they knew he was to be provided appointed counsel.

2. Whether the presumption of innocence guaranteed by the Fourteenth Amendment was violated when the trial was conducted over Edwards' objection at having to appear in "jailhouse slippers and clothes".

3. Whether completely precluding a defense witness from giving admissible testimony, as a sanction for untimely compliance with Arizona discovery procedures, violates the compulsory process guaranteed by the Sixth and Fourteenth Amendments, where there was virtually no showing that the State was in any way prejudiced by the tardy disclosure of the name of the witness.

4. Whether the prosecutor's summation violated Edwards' Fifth Amendment rights by his repeated comment on Edwards' failure to testify; which error was said to have been invited by the fact that Edwards conducted his own defense and summed up for himself.

5. Whether a delay of fourteen months from arrest to trial violated Edwards' Sixth Amendment right to a speedy and public trial, which he repeatedly asserted.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment XIV: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law,. . ."
>
> Amendment V: "No person. . .shall be compelled in any criminal case to be a witness against himself. . ."
>
> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

In October, 1974, the "La Conga" bar in Tucson, Arizona was robbed at gunpoint, just as the proprietor and a barmaid were closing for the evening. The proprietor, 74 years old, suffered a fatal heart attack during the robbery. Petitioner Robert Edwards was one of four individuals implicated by a felon and heroin user named Cleveland Reed who was apprehended during 1975 by the Tucson police on other criminal charges, and given complete immunity from all prosecution related to the La Conga bar incident, as well as special treatment in connection with other criminal charges. Edwards, an indigent black, was arrested on January 19, 1976, on a warrant charging him with murder, burglary, and robbery. Edwards was ultimately convicted of first degree felony murder, as well as burglary and robbery. He was first sentenced to death, but later given life imprisonment.[1] One co-defendant was similarly convicted and sentenced, while another was acquitted of felony murder by a jury, and convicted of the

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[1] The change in sentence was a result of the Arizona Supreme Court applying the Locket and Bell decisions of this Court to invalidate certain portions of the Arizona death sentencing statute.

burglary and robbery charges. Cleveland Reed, of course, went completely free.

After Edwards' arrest on January 19, 1976, he was taken to the Tucson Police Station, read his Miranda rights, and interrogated over a period of about two and one-half hours by Police Detective Sergeant Bunting and two other officers. At that time, Edwards gave an alibi statement, which was tape recorded and ultimately received in evidence at his trial. He then spoke with the detectives about making a deal, and said that he would wait to make a deal until he had spoken to an attorney. At a pre-trial motion to suppress Marmion's testimony of a confession the next day, the trial judge concluded that the statements by Edwards on the evening of his arrest constituted a claim of the right to consult counsel before making any statements. On Appeal, the Arizona Supreme Court agreed that Edwards had invoked his Sixth Amendment right to consult with counsel before breaking his silence. The Arizona Supreme Court said that "looking at Edwards' statement in the context made, that . . . it must be interpreted as a request for counsel and as a request to remain silent until counsel was present". 594 P.2d at 77, Appendix A, infra.

Edwards was taken from the police station to the jail, where he was held in solitary confinement overnight. As the dissenting opinion below notes, the next morning a jail detention officer told Edwards that detectives were there to see him. Edwards told the officer that he did not wish to speak to anyone. The detention office told him that he had to. Appendix A, infra, 594 P.2d at 83. Edwards was thereupon taken to an interrogation room, where Detectives Marmion and Milne were waiting to question him, "knowing that an attorney would not be appointed for him until the afternoon". Appendix A, infra, 594 P.2d at 83.

The Arizona Supreme Court noted that these detectives, although from the same section as Detective Bunting who had questioned

Edwards the day before, did not know that he had made the statement about an attorney. But Bunting, to whom the request had been made, had instructed Detective Milne to go to the jail to interview Edwards. II P 58.[2]

Edwards was read his Miranda rights at the jail interrogation, and when asked at the supression hearing before trial why he had not once again told these detectives that he wanted an attorney, he responded: "I didn't think you had to keep asking for an attorney over and over and over." Appendix A, infra, 594 P.2d at 83. According to the detectives, Edwards then said that he would tell them anything they wanted to know, but did not want any such comments tape recorded, because he did not want the statement used against him. The detectives testified that they explained to him that even unrecorded, oral statements could be presented against him at trial, and that Edwards then made inculpatory statements.

After leaving the interrogation room, Detective Marmion tape recorded his recollections of the interview, and thereafter testified at the trial, that Edwards had confessed.

On the afternoon of the day that Edwards had been interrogated at the jail over his objections, he was appointed counsel at his initial court appearance. Three or four days later, the detectives went back to the jail to attempt to obtain a statement from Edwards, but he declined to say anything.

At the suppression hearing the trial court initially suppressed the confession, holding that Edwards had exercised his rights to remain silent and to have advice of counsel before making any statements, and that this decision had not been scrupulously honored by the police, nor had these rights been waived. V M 39-41. Three days later, the Court

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[2] Reference is to the record that was before the Arizona Supreme Court, which included many volumes of trial transcript from both the first and second trial as well as photostated pleadings and instruments filed with the trial court. Abbreviations are explained in Appendix E to this Petition.

changed its mind, on the basis of an Arizona opinion that had not been earlier cited to him, and concluded that this Court's opinion in Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321 (1975) permitted the police conduct that obtained the confession.

On appeal, Edwards reasserted his Fifth and Sixth Amendment claims that the confession should have been suppressed, which had first been raised at the pre-trial suppression hearing. As has been noted, the Arizona Supreme Court agreed that Edwards had invoked his rights to remain silent and to have counsel before making further statements, on the evening of his arrest. Over dissent, however, it concluded that these rights were voluntarily and knowingly waived, and that the confession was therefore properly admitted.

Edwards chose to represent himself and conduct his own defense. It took two trials to convict him; there first having been a mistrial when the jurors could not reach a verdict.

At the beginning of the second trial, Edwards objected to being "in front of the jury in slippers and jailhouse clothes presenting the case to them". I Tr 9, 10. Edwards had been incarcerated in the Pima County Jail ever since his arrest on January 19, 1976. During the first trial Edwards had been provided with "civilian" clothing which he advised the Court, at the beginning of his second trial, the Sheriff's officers at the jail had either lost or misplaced.

Later in the same, first day of the trial, Edwards reiterated his objection to being tried in jailhouse clothes, saying, "They [the jury] know, if they have been in Arizona a long time, they know jailhouse clothes and I would not like to be presiding in the courtroom with jailhouse clothes. I think they would preclude [conclude] from some kind of reasoning. I think that would be a prejudicial factor to me." I Tr. 73. The judge perceived the problem, suggesting that perhaps clothing from the Salvation Army ought to be obtained. Id. at 74. At the time of Edwards' comment,

the State made no objection, nor voiced any disagreement with Edwards' description of his clothing as being jailhouse clothes that the jurors would recognize as such.

On appeal, Edwards urged in his brief that the presumption of innocence, guaranteed to him by the Fourteenth Amendment Due Process Clause, was violated by his trial in prison garb. The State contended that Edwards should have continued to object and establish a record that he remained in prison garb during the rest of the trial. The Arizona Supreme Court found no error, saying, "There is no indication in the record that Edwards' prison clothes were identifiable as such". Appendix A, infra, 594 P.2d at 81.

Like many states, Arizona has a system of pre-trial discovery and disclosure by which the defendant is obliged to apprise the State of witnesses he intends to call, and defenses he intends to invoke, after the State has made certain disclosures of its own case. Edwards timely disclosed an alibi defense, although all but one of his alibi witnesses were unlocatable due to the delay in bringing him to trial. The discovery procedures for Arizona criminal cases are found generally in Rule 15.2, et seq. of the Arizona Rules of Criminal Procedure, Volume 17, Arizona Revised Statutes Annotated. Rule 15.2 requires that the defendant provide the prosecutor with written notice of defenses to be invoked and witnesses to be called for each defense, all to be done within twenty days after the arraignment in the Superior Court. Rule 15.7 lists five sanctions that are available to the Court for failure by a party to comply with the disclosure and discovery rules. They include ordering disclosure of the information, granting a continuance, invoking contempt powers against the party or counsel, preclusion of witness' testimony, and declaring a mistrial when necessary to prevent a miscarriage of justice.

During the second trial, on the morning of April 22, 1977, Edwards advised the Court and the prosecutor that he was then disclosing

a defense witness, who would testify that Edwards had been extremely intoxicated at a party Campbell attended, at 6:00 p.m. on the evening when the robbery occurred. The prosecutor immediately objected that the disclosure was untimely. The Court ordered the witness to be made available for an interview by the prosecutor, and it was conducted at the lunch break. The prosecutor and one of his investigators recorded a fifteen minute interview with Mr. Campbell on Friday. IV Tr. 6-7. Three days later, on 25 April, the Court accepted an offer of proof from witness Campbell, heard argument on the State's request to preclude the witness, and imposed the sanction of preclusion. Edwards argued that the State had had an opportunity to investigate the proposed testimony of the witness, saying, "This is my defense. . .I think he will tell you about my whereabouts and then I have him as a credible witness and I have Mrs. Dolores to testify about my whereabouts after 6:00. This is the main factor in my case and the main credible witness that I will present to the court in my defense." IV Tr. 12. The State made no motion for a postponement, nor did the Court consider any other sanction.

On appeal, Edwards contended that preclusion of the witness violated his Sixth Amendment right to call witnesses, on the ground that there was no showing made of the need for such a severe sanction as preclusion. The Arizona Supreme Court, although recognizing that the testimony of Campbell was probably admissible, held that Campbell's preclusion did not prejudice Edwards to the extent that he was denied a fair trial, and therefore found no error.

Edwards' confession figured prominently in the summation of the case. At the beginning of his, the prosecutor wrote on an easel board, for the jury to view, the words "Defendant Confessed". At the beginning of his closing argument, Edwards then wrote on the easel board "The defendant did not confess". He then proceeded to argue the inferences available from the evidence in the record. The Arizona Supreme Court concluded

that statements about defendant not having confessed were made by Edwards without support in the record, but that was clearly not so.

Indeed, the prosecution's brief to the Arizona Court, on page 15, recognizes that Edwards was doing no more than arguing inferences from the evidence in the record, as his counsel would have been perfectly proper in doing had counsel instead of Edwards been doing the summation.

For example, Edwards argued that because the two interrogating detectives, Marmion and Milne, only gave testimony of an oral confession, and had no evidence of a written confession, the jury should conclude that Edwards did not confess and should "take that into what we call into consideration, into evidence". V Tr. 111, 127, 128. He also referred to the alibi statement that was admitted into evidence, saying "[a]s you heard in my statement, I was at a party" by which as the State acknowledged he was referring to the taped statement.

In his rebuttal argument, the prosecutor then made the following comments, which were interrupted by motions for a mistrial by the defense on the grounds that they constituted an impermissible comment on Edwards' failure to take the stand. The prosecutor said:

> "What evidence is there that he did not confess? Did any witness come in here and say on the witness stand under oath that there was no confession, there was no confession and the police are lying, there was no confession? That incident never occurred. This incident never occurred.
>
> No, ladies and gentlemen, nobody testified to that. No witnesses were called that testified about that confession being made. No witnesses whatsoever." V Tr. 138139.
>
> * * *
>
> "The most conclusive statement is his own statement. He never said he didn't confess other than writing it on the easel.
>
> He told you he wasn't involved in the crime, he wasn't guilty. Here he told you that like I'm telling you, like I'm talking to you, not under oath.

> I think you have to consider all the evidence in this case before you make up your minds about the case." V Tr. 147.

The Court denied two motions for a mistrial on the grounds that these comments drew the jury's attention to Edwards' failure to take the stand and testify. V Tr. 140, 148.

On appeal, Edwards argued that his Fifth Amendment right to remain silent was violated by these comments, but the Arizona Supreme Court held that the prosecutor's statements were invited by Edwards' error and therefore not grounds for reversal. This ruling was predicated on the erroneous misapprehension that there was no evidence in the record from which one could argue that Edwards had not confessed.

Edwards' conviction came 14 months after his arrest. Before the trial, the indictment had been dismissed because of irregularities in the Grand Jury proceedings. The State chose to spend four months appealing that ruling, rather than to have Edwards reindicted, which could be done (and which ultimately was done) within a matter of days. After being reindicted, Edwards filed Motions to Dismiss for Violation of His Rights to a Speedy Trial, on September 7, 1976 (R. 24) and on January 5, 1977 (R. 52(b)). He also filed a Notice of Impending Expiration of Time Limit, a pleading required by the Arizona Criminal Procedure Rules, to apprise the Court that deadlines created by State procedure were about to expire. As part of his motions on speedy trial grounds, Edwards provided an affidavit of an investigator that three alibi witnesses had been lost track of because of the time delay. (R. 37.) One of the alibi witnesses was ultimately located, but gave only hazy testimony at best. On appeal, the Arizona Supreme Court agreed that Edwards did adequately and repeatedly assert his right to a speedy trial, Appendix A, infra, 594 P.2d at 80. It concluded, however, that there was insufficient showing of prejudice because he could not prove that the loss of the alibi witnesses was caused by the delay. Of the fourteen months between arrest and ultimate trial, the Court

concluded that only four months were caused by the State. (Edwards had filed two motions for postponement when he was unable to locate his alibi witnesses.)

After the first trial resulted in a hung jury, Edwards was immediately retried, and ultimately convicted on felony murder, robbery and burglary counts. He was originally sentenced to death, but after appeal, and remand for resentencing on the capital count, he was sentenced to life imprisonment on the felony murder count. The Supreme Court affirmed the convictions, and Edwards' convictions and sentence have become final.

REASONS FOR GRANTING THE WRIT

The opinion of the Arizona Supreme Court sanctions a conviction that depended in great part upon an intentional deprivation of Edwards' right to counsel at the one most critical stage when it was needed - when his confession was being sought. It allowed the fact that he served as his own counsel and made his own final argument to be used to penalize him for failing to take the stand. In both instances the opinion of the Arizona court squarely conflicts with cases of this Court interpreting the constitutional guarantees claimed by Edwards. Other errors of the Arizona court in precluding witnesses, forcing Edwards to trial in prison garb, and delaying Edwards' trial, all conflict with cases of this Court recognizing these matters as critical in deciding whether a defendant was afforded a fair trial.

1. The confession obtained before counsel was furnished.

Edwards is an indigent, and was at the time of his arrest. The facts of this case present a familiar pattern and, if undisturbed, a distressing precedent for conduct by arresting officers during that period between arrest and the initial court appearance when a lawyer will normally be appointed for indigent defendants.

In this case, Detectives Milne and Marmion knew that if they did not get out to the jail and interrogate Edwards in the morning, he

would have counsel appointed at 1:30 p.m. that same afternoon. Thereafter, prospects for getting a statement were dim, as was demonstrated by the lack of results when Marmion revisited Edwards several days later. Edwards was in custody under the authority of a warrant charging him with felony murder. The purpose of the interrogation, therefore, was to develop trial evidence and not to determine who the perpetrator of the offense was. The interrogation was planned to occur before the State could, in the normal prosecutorial procedures, fulfill its obligation to allow Edwards to consult counsel as he had chosen to do.

The Arizona Court simply did not recognize that different principles flow from Miranda for those instances where an accused has claimed his right to counsel, before further custodial interrogation, then apply for waivers of a previous decision simply to remain silent. This Court said in Miranda:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." Miranda v. Arizona, 384 U.S. 436, 473-74 (1966).

That principle has been reiterated often, in the thirteen years since Miranda was decided. E.g., Michigan v. Mosley, 423 U.S. 96, 101, n. 7 (1975). ("[Mosley] does not involve the procedures to be followed if the person in custody asks to consult with a lawyer"); Brewer v. Williams, 430 U.S. 387 (1977); Fare v. Michael, C., ____ U.S. ____, (78-334 6/20/79) ("[T]he Court fashioned in Miranda the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.").

In the kind of situation found in this case the police have intentionally frustrated Edwards' decision to get legal advice before speaking further with them. They immediately opened a new interrogation

before he could speak to his lawyer. As Mr. Justice Stevens has written in another case:

> "The sole purpose of the visit was to obtain evidence for use at the trial. Accepting the prosecutor's evidence as true, defendant's participation in the crime had already been established and, therefor, no further investigation was necessary. The work of the agents was trial preparation, pure and simple.
>
> In a civil context I would consider this behavior unethica. and unfair. In a criminal context I would regard it as such a departure from 'procedural regularity' as to violate the due process clause of the Fifth Amendment. If the evidence of guilt is as strong as the prosecutor contends, such direct communication is all the more offensive because it was unnecessary. If there is doubt about defendant's guilt, it should not be overcome by a procedure such as this. United States v. Springer, 460 F.2d 1344, 1354, 55 (7th Cir. 1972) (Stevens, J. dissenting).

Chief Justice Burger, writing as a Circuit Judge, concluded that post-arrest interrogations of an accused who has counsel are prohibited by Miranda unless counsel has been given an opportunity to be present. Mathies v. United States, 347 F.2d 312, 316 n. 3 (D.C. Cir. 1967) (Burger, J.).

The Courts of Appeal have divided on the question whether this Court meant what it said in Miranda, that when an accused claims his right to counsel before further questioning, all questioning must cease until counsel is provided. Compare, United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir. 1978), cert. den., 436 U.S. 919 (although government's "burden is greater . . . to show a waiver after the right to counsel has been asserted than . . . a waiver of the right to remain a silent," there is no "blanket prohibition against further questioning") with, Nash v. Estelle, 560 F.2d 652, 656 (5th Cir. 1977), rehearing en banc granted 560 F.2d 660; United States V. Priest, 409 F.2d 491 (57th Cir. 1969) ("where there is a request for an attorney prior to any questioning . . . a finding of knowing and intelligent waiver of the right to an attorney is impossible").

The Circuits have also divided over the question of whether an accused can be interrogated after he has been appointed counsel and consulted with him, without letting that counsel know of the planned interview. Compare, United States v. Thomas, 474 F.2d 110 (10th Cir. 1973) (holding that once a defendant has an attorney, statement obtained by interview may not be offered unless accused's attorney was notified of interview and given a reasonable opportunity to be present); United States v. Riencke, 416 F.2d 69 (2nd Cir. 1969) (statement excluded because interrogator persisted in questioning even though he knew accused was waiting for an attorney to speak with him); with, Coughlan v. United States, 391 F.2d 371 (9th Cir. 1976); Wilson v. United States, 398 F.2d 331 (5th Cir. 1968) (criticizing interrogation of accused who had counsel, without counsel knowing of it, but permitting a finding of waiver). This Court has noted the circuit conflict, but has not been obliged to resolve it. Brewer v. Williams, 430 U.S. 387, 406, n. 11 (1977) (finding no waiver of right to counsel, therefor not reaching the matter of whether it can be waived without counsel knowing of the interrogation).

This is perhaps a case like Brewer, in that no waiver of the previously claimed right to counsel can be found on this record. Edwards was held in solitary confinement overnight, told he must speak with his interrogators, said that he did not at that point reiterate his request for counsel because he didn't think you had to do it "over and over and over", and said he would speak but wanted no statement used against him and therefor would give no recorded statement. There was surely no knowing, intelligent, voluntary choice demonstrated, during the hurried interrogation, which can be said to establish a waiver by Edwards of his rights to consult counsel and remain silent.

This cause should be taken so that the divisions among the Courts of Appeal can be resolved, as to whether police can, themselves, renew attempts to obtain statements after an accused has either asked for

counsel (and not gotten it) or has obtained counsel but the police secretly seek to get the accused to change his mind about giving them a statement. It presents a fairly typical fact pattern - an accused, electing to consult counsel, having to wait for a time, perhaps up to twenty-four hours before counsel is appointed for him at a first court appearance, and police attempting to intervene and obtain statements within that time.

The rule accepted by the Arizona court, agreeing with the Ninth Circuit, squarely conflicts with what was said in Miranda, and this Court's reaffirmation in Michigan v. Mosley, 423 U.S. 96 (1975), that if an individual states during questioning that he wants to consult with an attorney, interrogation must cease until an attorney is present, and that these procedures are different from those in which an individual simply asks to remain silent. 423 U.S. at 101, n. 7 and at 104 n. 10.

As Justice White noted in his concurrence in Mosley, there are reasons to keep lines of communicaton open between authorities and the accused when the accused chooses to remain silent, which are not present when the accused has instead chosen to obtain legal advice. In the latter circumstance, authorities may communicate with the accused through the attorney. Where the accused has expressed a preference to consult an attorney, he thereby indicates his own feeling that he cannot competently deal with authorities without legal advice, and "a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism". 423 U.S. 98 at n. 2.

2. Trial in Prison Garb.

This Court has held in Estelle v. Williams, 425 U.S. 501 (1976) that an accused cannot be compelled to go to trial in prison clothing, lest the jury regard him as likely to be guilty. The Court also concluded, however, that some might deem a trial in prison garb a way to elicit sympathy from a jury, and therefore, elect to be tried that way. Accordingly, before error can be claimed, an objection must be made to being tried in

jail clothing. Rather than to disagree with this analysis, however, the Arizona court chose to misapply the facts, and conclude that there was no showing that Edwards was in identifiable prison garb.

Edwards stated on the record that he was in prison clothing and that jurors would view him as such. The judge agreed, discussing the obtaining of "civilian clothes" from the Salvation Army. And the State did not disagree with the characterization by Edwards that he was in prison clothes that the jury would recognize as such. Indeed, on appeal the State only contended that Edwards should have made continuing objections to each day's trial in prison clothing, which is of course completely inconsistent with the effect that being once viewed in prison clothing would have on the presumption of innocence.

This Court should grant review because of the square conflict between the opinion of the Arizona Court in this case, and that of this Court in Estelle, supra.

3. The invocation of the overly harsh sanction of preclusion.

The Sixth Amendment affords every defendant compulsory process to aid his defense. Parenthetically, the prosecution has no corresponding constitutional right, although of course State procedures furnish compulsory process for the prosecution. The Arizona discovery rules allow a court to preclude calling of a witness, where the name of that witness was not timely disclosed.

Arizona has consistently overruled defendants' objections to the prosecution calling witnesses whose names were not disclosed, unless the defense has sought a postponement of the trial. E.g., State v. Ford, 108 Ariz. 404, 499 P.2d 699 (1972); State v. Chitwood, 73 Ariz. 161, 239 P.2d 353 (1951).

In this case, the prosecution did not seek a postponement; indeed three days were available to check out the witness' testimony after the prosecuting lawyer and his investigator took a tape recorded statement.

But the Arizona Court applied the preclusion sanction more harshly in derogation of the Sixth Amendment right of a defendant, than it does against the State.

This Court has not addressed the balance between the Sixth Amendment rights of a defendant to compulsory process, and the interest of the State in a system of pre-trial disclosure, beyond holding that such a system can be constitutional, Williams v. Florida, 399 U.S. 28 (1970), so long as it is reciprocal. Waridus v. Oregon, 412 U.S. 470 (1973). Under the application of the compulsory process clause explicated in Washington v. Texas, 388 U.S. 14 (1967), it seems plain that unduly heavy handed imposition of sanctions, particularly those that completely prevent obtaining testimony that the Supreme Court of Arizona itself concluded was probably admissible, present a substantial question that this Court ought to address.

4. The Arizona Court utilizing the constitutional right of a defendant to conduct his own defense, as justification for comment upon his failure to take the stand.

This Court has recognized that a defendant has a Sixth Amendment right to conduct his own defense. Faretta v. California, 422 U.S. 806 (1975). It of course takes no extended exegesis of cases from this Court or elsewhere, to recall that a prosecutor cannot make statements during his summation that are calculated to draw attention to the failure of a defendant to testify, or that would have such effect. E.g., Griffin v. California, 380 U.S. 609 (1965).

The Arizona Court blithely concluded that Edwards had no evidence from which he could conduct a final argument challenging the prosecutor's assertion that he had confessed. Such simply was not the case. Arizona cannot be allowed to use such a state procedure rule as "invited error", where the record does not even support it, to override so well established a Fifth Amendment Right.

The repeated, emphatic, reminder to the jury that Edwards had not ascended the witness chair cannot be countenanced. If conducting one's own defense and arguing the inferences from the evidence in a way that a lawyer would do invites that "error" as the Arizona Court thought, it is so as much when counsel makes arguments and draws inferences from the evidence, as when the defendant does so. And it would unduly erode the right of a defendant to represent himself. The matter is quite likely to reoccur, and squarely conflicts with the principles espoused by this Court in Farreta and Griffin.

CONCLUSION

The affirmance of Edwards' conviction by the Arizona Court squarely contravenes several cases of this Court. It exults form over substance in constitutional rights, by blinking the intentional frustration of Edwards' claim to a lawyer, at the arrest stage, and callously penalizing his decision to conduct his own defense, and doing so in a fully effective way. Edwards' trial can only be called "fair" by ignoring decisions of this Court on the presumption of innocence, the right to call witnesses, and guaranting a speedy trial. For these reasons it is respectfully requested that this Court grant Certiorari.

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MOLLOY, JONES, DONAHUE, TRACHTA,
CHILDERS & MALLAMO, P.C.
Of Counsel

STATE of Arizona, Appellee,
v.
Robert EDWARDS a/k/a Willie Barefield, Appellant.
No. 3957.
Supreme Court of Arizona,
En Banc.
March 27, 1979.
Rehearing Denied May 1, 1979.

Defendant was convicted in the Superior Court, Pima County, Cause No. 30683, Ben C. Birdsall, J., of robbery, burglary and first-degree murder, and he appealed. The Supreme Court, Hays, J., held that: (1) defendant's statement that he wanted to talk to an attorney before making a deal was sufficient as request for counsel and as request to remain silent until counsel was present; (2) finding that defendant's statement was voluntarily and knowingly made was not clearly and manifestly erroneous; (3) rule governing waiver of rights to counsel did not require that waiver of defendant's right to attorney at custodial interrogation be in writing or before the court; (4) since speedy trial limits began again following reindictment, and there was no violation prior to reindictment and no allegation of violation subsequent to reindictment, rule governing speedy trial was not violated; (5) where State did everything they could to locate witnesses, and defendant did not show that witnesses would have been available without delay caused by State, defendant was not unduly prejudiced as result of trial delay; (6) defendant was not prejudiced by preclusion of witness to such an extent that he was denied fair trial; (7) death of victim from heart attack which occurred during robbery could form basis of felony-murder conviction, and (8) where defendant was sentenced pursuant to portion of statute which was held unconstitutional, murder conviction was remanded for resentencing.

Affirmed in part and remanded for resentencing in part.

Gordon, J., dissented and filed opinion.

1. Criminal Law ⇐412.2(5)

Miranda was not intended to require that every reference to an attorney, regardless of its ambiguity, be construed as invocation of *Miranda* rights; statement must be examined in context made to determine whether it was sufficiently clear to be fairly interpreted as request for attorney or demand that interrogation cease.

2. Criminal Law ⇐412.2(5)

Defendant's statement that he wanted to talk to an attorney before making a deal was sufficiently clear to be interpreted as request for counsel and request to remain silent until counsel was present.

3. Criminal Law ⇐412.2(1)

Although *Miranda* requires that questioning cease after defendant asks for an attorney, it does not preclude defendant from changing his mind either on his own or in response to inquiry by police so long as decision is voluntarily made.

4. Criminal Law ⇐412.2(1)

Goal of *Miranda* is to insure that right to an attorney and right to remain silent are not reduced to meaningless phrases as result of overzealous police practices.

5. Criminal Law ⇐412.2(5)

Miranda does not create per se rule precluding defendant from initiating further discussions with police or from responding to subsequent inquiries from police after right to attorney had been invoked so long as waiver of such right is otherwise voluntary.

6. Criminal Law ⇐531(3)

Confessions are prima facie involuntary and burden is on State to show by preponderance of evidence that confession was freely and voluntarily made.

7. Criminal Law ⇐519(1)

In determining voluntariness of confession, trial court must look to totality of the circumstances surrounding confession and decide whether defendant's action is know-

APPENDIX A

ing and intelligent and whether his will has been overborne.

8. Criminal Law ⇐1158(4)

Finding by trial court that confession is voluntary will not be upset on appeal in absence of clear and manifest error.

9. Criminal Law ⇐414

In prosecution for robbery, burglary and murder, finding that defendant's statement to police was voluntarily and knowingly made was not clearly and manifestly erroneous.

10. Criminal Law ⇐412.2(5)

Rule of criminal procedure governing waiver of rights to counsel was not intended to require judicial presence and written waiver of counsel before custodial interrogation. 17 A.R.S. Rules of Criminal Procedure, rule 6.1(c).

11. Criminal Law ⇐412.2(5)

Rules of criminal procedure governing waiver of rights to counsel did not require that waiver of defendant's right to attorney during custodial interrogation be in writing or before the court. 17 A.R.S. Rules of Criminal Procedure, rule 6.1(c).

12. Criminal Law ⇐577.8

Where there was stay in effect during period of appeal by State from granting of motion for redetermination of probable cause in prosecution for robbery, burglary and murder, such stay necessarily halted all proceedings in the trial court and such period was excluded time under speedy trial rule. 17 A.R.S. Rules of Criminal Procedure, rule 8.1 et seq.

13. Criminal Law ⇐577.12(1)

Where there was no showing that State's action in appealing grant of motion for redetermination of probable cause was frivolous or taken in bad faith with intent to delay defendant's trial, limiting options available to State would have been wholly inappropriate, and thus State was not required to reindict defendant rather than seeking appellate relief and period of delay which resulted from appeal by State was not included in time period for purpose of speedy trial rule. 17 A.R.S. Rules of Criminal Procedure, rule 8.1 et seq.

14. Criminal Law ⇐577.14

In light of fact that speedy trial limits began anew following reindictment, defendant was not denied speedy trial in violation of rule where no violation occurred prior to reindictment on charges of robbery, burglary and murder, and there was no allegation of subsequent speedy trial violation. 17 A.R.S. Rules of Criminal Procedure, rule 8.1 et seq.

15. Criminal Law ⇐577.10(1)

Inquiry into possible violation of constitutional right to speedy trial focuses upon four factors: length of delay; reasons for delay; defendant's assertion of right, and prejudice caused defendant; of such factors, the first is least important while the last is most important. U.S.C.A.Const. Amend. 6.

16. Criminal Law ⇐577.15(4)

Although 14-month delay between indictment and trial appeared to be excessive, such delay was not prejudicial per se for purposes of determining violation of constitutional right to speedy trial. U.S.C.A. Const. Amend. 6.

17. Criminal Law ⇐577.10(10)

In prosecution for robbery, burglary and murder, defendant adequately and repeatedly asserted right to speedy trial for purposes of determining whether 14-month delay between indictment and trial constituted denial of constitutional right to speedy trial. U.S.C.A.Const. Amend. 6.

18. Criminal Law ⇐577.10(6)

Where court and State did everything they could have done to locate two alibi witnesses for defense, and defendant did not show that witnesses would have been available without delay caused by State, defendant was not unduly prejudiced as result of delay in prosecution for robbery, burglary and murder.

19. Criminal Law ⇐1144

Where record is silent, missing facts will be presumed to support conviction.

20. Criminal Law ⇐629

Where defendant was aware of witness and intoxication defense long before trial, but disclosed neither to the State, exclusion of witness as sanction for nondisclosure was not abuse of discretion. 17 A.R.S. Rules of Criminal Procedure, rule 15.7.

21. Criminal Law ⇐1166(1)

Testimony that witness saw defendant intoxicated some seven hours before crime, although probably admissible, was not so dispositive that its absence denied defendant fair trial; thus, defendant was not prejudiced by preclusion of witness to such extent that he was denied a fair trial. 17 A.R.S. Rules of Criminal Procedure, rule 15.7.

22. Criminal Law ⇐726

In closing argument, defendant's oral and written statements before the jury asserting that he had not confessed were improper as they were wholly unsupported by the evidence; thus, any error in prosecutor's statements made in response to defendant's argument was error invited by defendant, and defendant could not raise error which he invited hoping to benefit thereby.

23. Homicide ⇐5

Death of victim from heart attack which occurred during robbery could form basis of felony-murder conviction, notwithstanding that such death was unintended and accidental.

24. Criminal Law ⇐1209

Conviction and sentence for robbery, burglary and felony-murder on basis of death of victim from heart attack which occurred during robbery did not violate double punishment statute. A.R.S. § 13–1641 (Repealed).

25. Homicide ⇐236(1)

Evidence in prosecution for felony-murder, including testimony of pathologist that, in his expert opinion, death of victim resulted from heart attack induced by anxiety resulting from being robbed at gunpoint, was sufficient to support causation element.

26. Criminal Law ⇐1188

Where defendant was sentenced pursuant to portions of statute which was held unconstitutional, murder conviction was remanded for resentencing. A.R.S. § 13–454, Laws 1973, ch. 138.

Bruce E. Babbitt, former Atty. Gen., Robert K. Corbin, Atty. Gen., by William J. Schafer, III, and Crane McClennen, Asst. Attys. Gen., Phoenix, attorneys for appellee.

Molloy, Jones, Donahue, Trachta & Childers by Michael J. Meehan, Tucson, attorneys for appellant.

HAYS, Justice.

This is an appeal by Robert Edwards from his convictions of robbery, burglary, and first degree murder, and from his sentence of death for the murder conviction. We have jurisdiction pursuant to article 6, § 5 of the Arizona Constitution and A.R.S. § 13–4031. We affirm the convictions and sentences for robbery and burglary, and the murder conviction, but remand the murder conviction for resentencing.

We are presented with nine issues on appeal:

1. Whether Edwards' confession was admissible;
2. Whether, in deference to Edwards' right to a speedy trial, the state must forego its right to file a special action when a speedier alternative is available;
3. Whether Edwards' right to a speedy trial was violated;
4. Whether Edwards's trial in prison garb, over his objection, violated his right to due process;
5. Whether the preclusion of a defense witness was an abuse of discretion;
6. Whether the prosecutor's statements in his closing argument constituted an impermissible comment on Edwards' failure to take the stand;
7. Whether an unintended or accidental death may be the basis for a felony murder conviction;

8. Whether A.R.S. § 13–1641 (now renumbered as § 13–116) precludes conviction and punishment for robbery and burglary in addition to first degree murder when the latter is a felony murder; and
9. Whether there was sufficient evidence of causation in the record to support the felony murder conviction.

In October, 1974, a bar in Tucson was robbed at gunpoint. During the robbery the proprietor suffered a fatal heart attack. After obtaining some money and valuables the robbers fled. The police investigated the crime but soon exhausted all leads. In January, 1976, they obtained information that led to the arrest of Edwards and several co-conspirators. Edwards was subsequently convicted of robbery, burglary, and first degree murder.

CONFESSION

Edwards was arrested at his home at 4:00 P.M. He was not read the *Miranda*[1] warnings at that time nor did he make any statements, but was taken to the police department where he was read his rights. He indicated he understood them and that he would submit to questioning. After again having his rights explained to him, he was interrogated by a detective who told him that a co-conspirator had implicated him in the robbery of a Tucson bar. Edwards denied involvement and gave a taped alibi statement, at the beginning of which he was again read his rights. After the statement, he asked the detective if he could make a deal. The detective replied that he wanted a statement but that he could make no deals. Consequently, Edwards asked to talk to the county attorney about making a deal, which he was allowed to do. The negotiations were unsuccesaful. Edwards then reapproached the detective about a deal. The detective repeated his earlier statement that he could make no deals, to which Edwards replied, "I want an attorney before making a deal." He did not indicate, however, nor did the detective interpret his statement to mean that he wanted an attorney before further interrogation or that he wished to remain silent thereafter. The detective, nevertheless, ceased questioning immediately after Edwards' statement at about 6:30 P.M. Thereafter, Edwards was taken to the county jail.

At 9:15 the next morning two other detectives arrived at the jail and asked to see Edwards. Although they were from the same section as the detective who had questioned Edwards the day before and knew that he had been questioned, they did not know that he had made the statement about an attorney. When the detention officer told Edwards that the detectives were there to see him, he told the officer that he did not wish to speak to anyone. The officer told him that he had to. Edwards was thereupon taken to see the detectives. They identified themselves and said they wanted to talk to him. At that point they explained to him that he had the right to remain silent and the right to an attorney and the other *Miranda* rights. Edwards said that he was willing to talk to them but that he first wanted to hear the taped statement of his co-conspirator that the detective had told him about the day before. After a portion of the tape was played, he told the detectives that he would make a statement but that he did not want it recorded because it could be used against him in court. The detectives thoroughly explained that whether or not the statement was recorded did not matter because an oral statement could also be used against him in court. Edwards replied "I'll tell you anything you want to know, but I don't want it on tape." Edwards then gave a statement indicating his involvement in the robbery. The interrogation concluded at 10:30 A.M. Prior to trial, Edwards moved to suppress the confession and a hearing was held. The court found that the statement was voluntarily given but that the detectives violated *Miranda* when they reapproached Edwards after his statement about an attorney. However, the next day the judge reversed his ruling based on *State*

1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

v. Travis, 26 Ariz.App. 24, 545 P.2d 986 (1976), and found the confession to be admissible substantively.

Edwards claims on appeal that he exercised both his right to an attorney and his right to remain silent, that he did not subsequently waive either right, and that in any case his statement was not intelligently made and was therefore involuntary. First, we must determine whether, having initially waived his rights, Edwards adequately reclaimed them by declaring that he would wait to talk to an attorney before making a deal.

Invocation of Previously Waived Miranda Rights

Miranda v. Arizona, 384 U.S. 436, 444–45, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 706–07 (1966), holds that if a defendant indicates "in any manner" that he wishes an attorney before speaking or that he does not wish to be interrogated further, questioning must cease. Edwards points to this language in *Miranda* and argues that his statement was adequate to raise both his right to an attorney and his right to remain silent.

The state argues, however, that by stating he wanted to see an attorney before making a deal, Edwards was not raising his right to an attorney as such, nor saying that he wished to remain silent, but only asserting that he wanted to see an attorney before talking anymore about a deal. For this proposition, the state relies on *State v. Travis, supra*. There, after the defendant had been arrested and read his rights, he made equivocal statements about desiring an attorney. A detective asked him if he would submit to a breathalyzer test and allow the interview to be recorded. The defendant responded that he wanted to seek the advice of counsel before granting either request. The detective then told him that his wife had died and that he would now be charged with first degree murder. The defendant broke down and confessed his involvement. In ruling that his confession was admissible, the court reasoned that the defendant never made a definite statement to the effect that he either wanted to talk to an attorney before answering questions or preferred that questioning cease. *Id.* 26 Ariz.App. at 29, 545 P.2d at 991.

[1] Notwithstanding the "in any manner" language of *Miranda*, *supra*, we are convinced that *Miranda* was not intended to require that every reference to an attorney, regardless of its ambiguity, must be construed as an invocation of the *Miranda* rights.[2] We think *Travis* is correct in looking at a statement in the context made and attempting to determine whether it is sufficiently clear to be fairly interpreted as a request for an attorney or a demand that interrogation cease. There is much authority in support of this view. *See, e. g., United States v. Rodriguez-Gastelum*, 569 F.2d 482, 484 (9th Cir.), *cert. denied*, 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760 (1978); *United States v. Tokoph*, 514 F.2d 597, 605 (10th Cir. 1975); *United States v. Howard*, 152 U.S.App.D.C. 258, 259–60, 470 F.2d 406, 407–08 (1972); *State v. Knapp*, 114 Ariz. 531, 538, 562 P.2d 704, 711 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978); *State v. Gholson*, 112 Ariz. 545, 548, 544 P.2d 654, 657 (1976); *State v. Garrison*, 16 Or.App. 588, 519 P.2d 1295, 1300–01 (1974).

[2] Applying this reasoning in an evaluation of Edwards' statement, it appears at first blush that the state's argument is correct, *i. e.*, that Edwards was saying that he desired an attorney only if a deal was discussed further. However, looking at the statement in the context made, we find such an interpretation erroneous.

To accept the state's position in this case and allow Edwards' confession to stand while holding that he asked for an attorney for the limited purpose of making a deal would be illogical. Edwards wanted an attorney before making a deal. His part of

2. *Miranda* itself would seem to concede as much by indicating its approval of the policy of the Federal Bureau of Investigation that the initial decision as to whether, in an ambiguous statement, the defendant has asked for an attorney is for the agent on the scene. *See* 384 U.S. at 485–86 & n. 55, 86 S.Ct. at 1633–34 & n. 55, 16 L.Ed.2d at 729–30 & n. 55.

the deal would have been his confession. Therefore, to allow him to make a confession without counsel would be to deny him his right to counsel for the very purpose, albeit limited, for which it was invoked. Likewise, it would be just as illogical to hold that his statement was enough to invoke his right to remain silent only if questioned about a deal. We hold therefore, looking at Edwards' statement in the context made, that although it was equivocal, its meaning was sufficiently clear and therefore it must be interpreted as a request for counsel and as a request to remain silent until counsel was present.

We must now determine whether, after invoking his right to counsel and right to remain silent, Edwards waived them. Our discussion at this point is twofold: first, whether *Miranda* creates a per se rule against waiver of the right to an attorney or the right to remain silent after being invoked; and whether the waiver, if constitutionally permissible, was voluntary.

Per Se Rule Regarding Right to Attorney

[3-5] Edwards argues that *Miranda* creates a per se rule that once a defendant invokes his right to counsel he may not then be questioned again by police until an attorney is present. We do not agree. Although *Miranda* does require that questioning cease after a defendant asks for an attorney, we do not believe it precludes the defendant from changing his mind either on his own or in response to an inquiry by police so long as the decision is voluntarily made. We agree with the Ninth Circuit decision in *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.), *cert. denied*, 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760 (1978), that per se rules often cause a court to lose touch with the purpose behind the rules. The goal of *Miranda* is to insure that the right to an attorney and the right to remain silent are not reduced to meaningless phrases as the result of overzealous police practices. 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706. However, "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and *deprive suspects of an opportunity to make informed and intelligent assessments of their interests.*" (Emphasis added.) *Michigan v. Mosley*, 423 U.S. 96, 102, 96 S.Ct. 321, 326, 46 L.Ed.2d 313, 320 (1975). Reading *Miranda* to create such a per se rule would preclude a defendant, upon intelligent reflection, from voluntarily and knowingly acting as he thinks best. It would work to "imprison a man in his privileges." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280, 63 S.Ct. 236, 242, 87 L.Ed. 268, 275 (1942). We therefore hold, as did the Ninth Circuit in *Rodriguez-Gastelum, supra*, that *Miranda* does not create a per se rule precluding a defendant from initiating further discussions with police or from responding to subsequent inquiries from police after the right to an attorney has been invoked so long as the waiver is otherwise voluntary.

Per Se Rule Regarding Right to Remain Silent

Edwards also claims that *Miranda* creates a per se rule against questioning by police after the defendant has invoked his right to remain silent. We previously rejected this assertion in *State v. Hatton*, 116 Ariz. 142, 568 P.2d 1040 (1977), where the defendant, having invoked his right to remain silent, was twice reapproached by the police and interrogated. Citing *Michigan v. Mosley*, 423 U.S. 96, 102-03, 96 S.Ct. 321, 326, 46 L.Ed.2d 313, 321 (1975), for the proposition that *Miranda* cannot be interpreted to "'create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject,'" we held that the questioning of the defendant by police was permissible since the defendant's right to cut off questioning was scrupulously honored. 116 Ariz. at 146, 568 P.2d at 1044. We find *Hatton* controlling. Since, as in *Hatton*, Edwards was reminded of his *Miranda* rights and was asked by the detectives if he would voluntarily make a statement, we conclude that his right to cut off questioning was scrupulously honored.

Voluntariness of Waiver

[6-8] Finally, Edwards claims that his confession was involuntary since it was not knowingly made. In Arizona, confessions are prima facie involuntary and the burden is on the state to show by a preponderance of the evidence that the confession was freely and voluntarily made. *State v. Hall*, 120 Ariz. 476, 586 P.2d 1288 (1978). In determining the voluntariness of a confession, the trial court must look to the totality of the circumstances surrounding the confession and decide whether the defendant's action is knowing and intelligent and whether his will has been overborne. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854, 862 (1973); *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). Once the court finds, as it did in this case, that the confession is voluntary, the finding will not be upset on appeal absent clear and manifest error. *State v. Edwards*, 111 Ariz. 357, 361, 529 P.2d 1174, 1178 (1974). We find no such clear and manifest error.

[9] Edwards claims that his comment "I'll tell you anything you want to know, but I don't want it on tape" reveals his misunderstanding of the use of the confession he gave and that therefore it was not knowingly given. The state argues that the admissibility of an oral statement was thoroughly explained and that he refused to have it recorded for reasons of his own, *i. e.*, because of the impression he received after just having listened to his co-conspirator's taped confession. In any case, recognizing that the trial court found that Edwards' statement was voluntarily and knowingly made, and applying the rules of law set out above, we cannot say that the court's finding was clearly and manifestly erroneous.

In conclusion, we find that Edwards did invoke his right to an attorney and his right to remain silent even though his statement was not altogether clear. We also find, however, that the question whether he waived them is not amenable to a per se rule and thus is left to the trial court whose decision must be guided by the rules for determining voluntariness. The trial court's finding that the waiver and confession were voluntarily and knowingly made is upheld.

Written Waiver Requirement

Edwards claims that even if he did waive his *Miranda* rights, 17 A.R.S. Rules of Criminal Procedure, rule 6.1(c), indicates that a waiver of the right to counsel is ineffective unless made before a judge and in writing. We do not agree.

[10, 11] Although rule 6.1 can be read as Edwards reads it,[3] it was not intended to require judicial presence and written waiver of counsel before custodial interrogation nor have we ever required such in order for the defendant to waive his right to an attorney during custodial interrogation. *See, e. g., State v. Hall*, 120 Ariz. 476, 586 P.2d 1288 (1978); *State Ferguson*, 119 Ariz. 55, 579 P.2d 559 (1978); *State v. Arnett*, 119 Ariz. 38, 579 P.2d 542 (1978); *State v. Ramirez*, 116 Ariz. 259, 569 P.2d 201 (1977); *State v. Hatton*, 116 Ariz. 142, 568 P.2d 1040 (1977); *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908,

3. 17 A.R.S. Rules of Criminal Procedure, rule 6.1, provides in relevant part:

a. Right to be Represented by Counsel. A defendant shall be entitled to be represented by counsel in any criminal proceeding, except in those petty offenses such as traffic violations where there is no prospect of imprisonment or confinement after a judgment of guilty. The right to be represented shall include the right to consult in private with an attorney, or his agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

c. Waiver of Rights to Counsel. A defendant may waive his rights to counsel under (a) and (b), in writing, after the court has ascertained that he knowingly, intelligently and voluntarily desires to forego them. When a defendant waives his rights to counsel, the court may appoint an attorney to advise him during any stage of the proceedings. Such advisory counsel shall be given notice of all matters of which the defendant is notified.

98 S.Ct. 1458, 55 L.Ed.2d 500 (1978); *State v. Jenkins*, 111 Ariz. 13, 522 P.2d 1090 (1974). We therefore hold that rule 6.1(c) does not require that a waiver of a defendant's right to an attorney at custodial interrogation be in writing or before the court.

SPEEDY TRIAL

Edwards raises two distinct arguments regarding his right to a speedy trial: first, that the state is required by 17 A.R.S. Rules of Criminal Procedure, rule 8, to forego use of a special action when another procedural option is available whether or not the trial proceedings have been stayed; and second, that the delay with its allegedly resulting prejudice denied him his sixth amendment rights.

Rule 8 Violation

Edwards was arraigned on January 23. On March 5, Edwards moved for a redetermination of probable cause. The court granted the motion on March 22 finding that the state had failed to reveal all exculpatory information in its possession to the grand jury, but also finding that the state had not acted in bad faith. At that point, the state could have reindicted Edwards or it could have challenged the trial court's ruling by special action. It chose the latter alternative by filing a motion to stay and a special action. The court of appeals granted the stay but denied relief and later denied a motion for rehearing. The state then petitioned this court for review which was denied on July 20. On July 30, Edwards was reindicted following a determination by the grand jury that probable cause existed.

Edwards argues that the state should simply have reindicted him pursuant to the trial court's order rather than seeking appellate relief and that since it chose the more time-consuming procedure, the resulting period of delay (about four months) should be included in the rule 8 speedy trial time periods time periods. We do not agree for two reasons.

[12–14] First, there was a stay in effect during the period of the appeal that necessarily halted all proceedings in the trial court. Such a period is excluded time under rule 8. *State v. Steele*, 23 Ariz.App. 73, 76, 530 P.2d 919, 922 (1975). Second, to require the state to employ the less time-consuming procedure when another is authorized by law would deprive the state of a legitimate remedy. Where, as here, there is no showing that the state's action was frivolous or taken in bad faith with intent to delay the defendant's trial, we think a rule limiting the options available to the state is wholly inappropriate. Computing the time involved while excluding the time taken by the appeal, the defendant had not, as of the date of his reindictment, been denied a speedy trial in violation of rule 8. Finding that no violation had occurred to that point, and noting that the speedy-trial limits begin again following reindictment, *State v. Soto*, 117 Ariz. 345, 348, 572 P.2d 1183, 1186 (1977), and since Edwards alleges no subsequent speedy-trial violation unless the earlier period is included, we find that rule 8 was not violated.

Sixth Amendment Speedy-Trial Violation

[15] Edwards alleges that he was denied his constitutional right to a speedy trial by his lengthy incarceration while awaiting trial. He was arrested on January 19, 1976 and finally went to trial on March 17, 1977, a delay of 14 months. In *State v. Soto*, 117 Ariz. 345, 572 P.2d 1183 (1977), we held that a delay of nine months was sufficient to trigger further inquiry into the trial delay. That inquiry focuses on four factors set out by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972):

1. The length of the delay.
2. The reasons for the delay.
3. The defendant's assertion of his right.
4. The prejudice caused the defendant.

Of these factors, the first is least important while the last is most important. *State v. Soto, supra.*

Delay

[16] A 14-month delay seems to be excessive, but without looking into the reasons for the delay, we cannot conclude that the delay was prejudicial per se.

Reason for Delay

Only four months of the 14-month delay was caused by the state. Edwards claims that the state should be chastised for using four months to appeal an order when it could have simply reindicted as it ultimately was required to do. He cites *United States v. Perry*, 353 F.Supp. 1235, 1237 (D.D.C.1973), as authority for his position. There, the court did criticize the prosecution for delaying trial, but because it had taken fourteen months for appeals which could have been completed in four (as they were here), not because the state had chosen to appeal. On the other hand, in *United States v. Osuna-Sanchez*, 446 F.2d 566 (9th Cir. 1971), *cert. denied*, 404 U.S. 1022, 92 S.Ct. 698, 30 L.Ed.2d 672 (1972), the court looked at the diligence of the prosecution in the appeal process and held that a six-month delay because of the appeal did not violate the defendant's right to a speedy trial.

Edwards attempts to distinguish *Osuna-Sanchez, supra*, and similar cases, *e. g., People v. Stewart*, 61 Mich.App. 167, 232 N.W.2d 347 (1975), that approve the use of interlocutory appeals by the state by pointing out that these cases involve appeals from trial court orders suppressing prosecutor's evidence and were therefore absolutely necessary to the prosecution's cases. We are not inclined to accept this distinction nor hold that the state's right to challenge an adverse trial court ruling by special action prior to a criminal trial is limited to those situations in which it is absolutely necessary, at least in the absence of any evidence in the record to show that the appeal was frivolous or taken in bad faith with the intent to delay the trial.

Defendant's Assertion of Right

[17] Although the state argues to the contrary, we find after examining the record that Edwards did adequately and repeatedly assert his right to a speedy trial.

Prejudice to Defendant

[18] Edwards claims that he was prejudiced by the delay because he was not able to locate two alibi witnesses essential to his defense. We do not believe the record supports Edwards' claim of prejudice for the following reasons. Edwards made no offer of proof to the court of the alleged testimony of the alibi witnesses had they been located. Nor did he show that the witnesses would have been available if the state had not delayed the trial for four months. He called one alibi witness in whose *sole* presence he claimed he was during the robbery. He was granted numerous continuances in order to locate the witnesses and the court issued several requests for attendance of witnesses to one state in which it was thought the witnesses were residing. The state had never interviewed the witnesses nor did it know where they lived.

Although we recognize that these witnesses may have aided Edwards at trial, we cannot say that their absence prejudiced him to such an extent that he was denied a fair trial. He is, after all, entitled to a fair trial, not a perfect one. *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476, 484 (1968). Since the court and the state did everything they could have done to locate the witnesses and since Edwards did not show that the witnesses would have been available without the delay caused by the state, we find that Edwards was not unduly prejudiced as a result of the delay. *See State v. Watson*, 114 Ariz. 1, 6, 559 P.2d 121, 126 (1976), *cert. denied*, 430 U.S. 986, 97 S.Ct. 1687, 52 L.Ed.2d 382 (1977); *Sigard v. State*, 537 S.W.2d 736, 739 (Tex.Cr.App.1976).

Edwards also alleges other bases for prejudice. We have reviewed these claims and find them equally without merit. Therefore, having considered all the factors required by *Barker v. Wingo, supra*, we conclude that Edwards' constitutional right to a speedy trial was not violated.

PRISON GARB

[19] Edwards claims he was denied the due process right to a presumption of innocence by being tried in prison garb, citing *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). In *Estelle*, the Supreme Court held that an accused may not be compelled against his will to go to trial in identifiable prison garb. Edwards' reliance on *Estelle* is misplaced. *Estelle* deals with the case in which the defendant was tried in *identifiable* prison garb. There is no indication in the record that Edwards' prison clothes were identifiable as such. No effort was made by defendant to make an offer of proof as to the identifiable nature of his clothes. It is well-settled law in Arizona that where the record is silent, the missing facts will be presumed to support the conviction. *E. g., State v. Caldwell*, 117 Ariz. 464, 468, 573 P.2d 864, 868 (1977); *State v. Williams*, 113 Ariz. 442, 444, 556 P.2d 317, 319 (1976); *State v. Bojorquez*, 111 Ariz. 549, 553, 535 P.2d 6, 10 (1975).

PRECLUSION OF DEFENSE WITNESS

[20] During the trial, Edwards attempted to call a witness that would have testified that he was intoxicated at 6:00 P. M., the night before the robbery. Even though Edwards was aware of both the witness and the intoxication defense long before trial, neither had been disclosed to the state. The state objected not only because Edwards had known of the witness and of the new defense before trial and had not disclosed them, but also because it believed that testimony of intoxication at 6:00 P. M. was not relevant to the defendant's participation in a robbery at 1:00 A. M. the next morning, seven hours later. The court excluded the witness as a sanction for Edwards' nondisclosure. Edwards argues that exclusion of the witness was an abuse of discretion by the trial court. We disagree.

[21] We have repeatedly held that the imposition of a sanction pursuant to 17 A.R.S. Rules of Criminal Procedure, rule 15.7, is within the sound discretion of the trial court, and absent a showing of prejudice this court will not find an abuse of discretion. *State v. Ramirez*, 116 Ariz. 259, 268, 569 P.2d 201, 210 (1977); *State v. Clark*, 112 Ariz. 493, 495, 543 P.2d 1122, 1124 (1975). The prejudice must be such that the defendant has been denied a fair trial. *See State v. Dorow*, 116 Ariz. 294, 295, 569 P.2d 236, 237 (1977).

We do not believe that Edwards was prejudiced by the preclusion of the witness to such an extent that he was denied a fair trial. The testimony that he saw Edwards intoxicated some seven hours before the crime, although probably admissible, was not so dispositive that its absence denied Edwards a fair trial.

CLOSING ARGUMENT

[22] As the prosecutor began his closing argument he wrote on a chalk board, "Defendant confessed." At the beginning of Edwards' closing argument, Edwards, representing himself, wrote on the chalk board, "Defendant did not confess." He also told the jury during his closing argument that he did not confess to the detectives. In his rebuttal, the prosecutor made the following statements which Edwards characterizes as impermissible comments on his failure to take the stand but which the state characterizes as a justifiable response to Edwards' statements which were unsupported by the evidence before the jury:

> " 'The evidence, you will recall, is what the witnesses say from the witness stand here under oath. And there is an important thing about witnesses and what they testify to. They are subject to cross-examination. That is, you can ask the witness, "Well, how do you remember that, Mr. Witness? How do you remember this, Mr. Witness? Isn't such and such true, Mr. Witness?"
>
> The witness answers you back. That's testimony. That's evidence.
>
> What evidence is there that he did not confess? Did any witness come in here and say from the witness stand under oath that there was no confession, there was no confession and the police are lying, there was no confession? That incident never occurred.

No, ladies and gentlemen, nobody testified to that. No witnesses were called that testified about that confession not being made. No witnesses whatsoever.

The most conclusive statement is his own statement. He never said he didn't confess other than writing it on the easel.

He told you he wasn't involved in the crime, he wasn't guilty. Here he told you that like I'm telling you, like I'm talking to you, not under oath.'"

In determining whether these statements were improper, we must obviously examine them in the context made. *See State v. Ramirez*, 116 Ariz. 259, 263, 569 P.2d 201, 205 (1977). The state had introduced substantial evidence that Edwards had confessed, including the content of his confession. Edwards chose not to testify at trial. He had introduced no evidence whatsoever that he had not confessed. Before the closing arguments he was warned by the judge not to make statements that were unsupported by the evidence before the jury. Nevertheless, he argued that he had not confessed and wrote "Defendant did not confess" on the chalk board.

Upon reviewing these circumstances, we conclude that Edwards' oral and written statements before the jury were improper since they were wholly unsupported by the evidence. *State v. Dutton*, 106 Ariz. 463, 465–66, 478 P.2d 87, 89–90 (1970). The prosecutor's statements were made in response to Edwards' argument. The error was invited by Edwards. He cannot now raise error that he invited hoping to benefit thereby. *State v. Purcell*, 117 Ariz. 305, 308, 572 P.2d 439, 442 (1977); *State v. Wilcynski*, 111 Ariz. 533, 535, 534 P.2d 738, 740, *cert. denied*, 423 U.S. 873, 96 S.Ct. 141, 46 L.Ed.2d 104 (1975).

FELONY MURDER CONVICTION

[23] Edwards argues that the death of the victim from a heart attack that occurred during the robbery may not form the basis of a felony murder conviction because it was unintended and accidental. The cases are to the contrary. In *State v. Ferrari*, 112 Ariz. 324, 328, 541 P.2d 921, 925 (1975), we noted that a murder that is committed in perpetration of a burglary or any other specifically named felony is punishable as felony murder whether wilful and premeditated or only accidental. *See also State v. Hitchcock*, 87 Ariz. 277, 350 P.2d 681 (1960), *cert. denied*, 365 U.S. 609, 81 S.Ct. 823, 5 L.Ed.2d 821 (1961); *People v. Stamp*, 2 Cal.App.3d 203, 82 Cal.Rptr. 598 (1969), *cert. denied*, 400 U.S. 819, 91 S.Ct. 36, 27 L.Ed.2d 46 (1970); *State v. McKevier*, 89 N.J.Super. 52, 213 A.2d 320 (1965).

[24] Edwards also contends that a conviction and sentence for robbery, burglary, and murder violate the double-punishment statute, A.R.S. § 13–1641 (now § 13–116). In *State v. Miniefield*, 110 Ariz. 599, 603, 522 P.2d 25, 29 (1974), we held that convictions and sentences for both first degree murder and arson (the underlying felony) did not violate A.R.S. § 13–1641. *Accord, State v. Clayton*, 109 Ariz. 587, 600, 514 P.2d 720, 733 (1973). We find these cases controlling.

SUFFICIENCY OF THE EVIDENCE

[25] Edwards complains that there was not sufficient evidence on which the jury could find that the robbery caused the victim's death. We do not agree. A pathologist testifying for the state indicated that, in his expert opinion, the death resulted from a heart attack induced by the anxiety resulting from being robbed at gunpoint. He reiterated his opinion on cross and again on redirect. We think there was more than adequate competent evidence before the jury to support the causation element.

SENTENCING

[26] Since Edwards was sentenced pursuant to the portions of A.R.S. § 13–454 which we held unconstitutional in *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, — U.S. ——, 99 S.Ct. 1254, 59 L.Ed.2d 478, this case is remanded for resentencing.

We have reviewed the entire record for fundamental error and have examined all arguments raised by Edwards and find that

he was not denied a fair trial. The convictions for robbery, burglary, and first degree murder are affirmed along with the sentences for robbery and burglary. The murder conviction is remanded for resentencing pursuant to *State v. Watson, supra.*

CAMERON, C. J., STRUCKMEYER, V. C. J., and HOLOHAN, J., concur.

GORDON, Justice (dissenting):

The majority opinion states that *Miranda* does not place a per se ban on police questioning of a suspect after he has invoked his right to counsel. This is clearly the law in Arizona. This Court has held that questioning a suspect after he has asserted his *Miranda* rights is permissible, so long as the suspect's right to cut off the questioning is "scrupulously honored." *State v. McGinty,* 120 Ariz. 162, 584 P.2d 1153 (1978); *State v. Hatton,* 116 Ariz. 142, 568 P.2d 1040 (1977).

Similarly, the Ninth Circuit Court of Appeals, in *United States v. Rodriguez-Gastelum,* 569 F.2d 482 (9th Cir. 1978) *cert. denied,* 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760 (1978), held that although questioning must stop after a right to counsel is asserted, it can later resume if the suspect makes a waiver of the right. Such a waiver of a previously asserted right must meet the definition pronounced in *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). That is to say, it must be an intentional relinquishment or abandonment of a known right or privilege. The *Rodriguez-Gastelum* opinion specifically concluded that a waiver could meet this test even if the questioning was resumed at the instigation of the police.

The facts of this case, however, do not meet the requirements of either the Ninth Circuit or Arizona case law. Edwards asserted that he wanted an attorney before making a deal. At this point all questioning ceased. The next morning, the detention officer told Edwards that detectives were there to see him. *Edwards told the officer that he did not wish to speak to anyone. The officer told him that he had to.*

Because Edwards was told that he had to talk to the detectives, I disagree with the majority's conclusion that his right to cut off the questioning was scrupulously honored. For the same reason his subsequent statements were not an intentional relinquishment or abandonment of his right to counsel, even though the detectives once again read him his *Miranda* rights. This is evidenced by the fact that when asked at the motion to suppress hearing why he had not once again told these detectives that he wanted an attorney, he responded: "I didn't think you had to keep asking for an attorney over and over and over."

Moreover, I cannot condone the tactics of the investigating detectives. Despite the suspect's prior assertion of his right to counsel, detectives questioned him the following morning, knowing that an attorney would not be appointed for him until the afternoon. I find the language of *State v. Sauve,* 112 Ariz. 576, 544 P.2d 1091 (1976) controlling on these facts.

> "After the defendant's refusal to answer questions, the officers ceased interrogation, but their *subsequent conduct and statements were made to persuade the defendant to reconsider his position.* Any response under such circumstances cannot be considered 'volunteered,' and the statements were not admissible." 112 Ariz. 576, 579, 544 P.2d 1091, 1094. (Emphasis added.)

Despite Arizona's rejection of a per se rule regarding the right to remain silent, a suspect's right to cut off questioning must be scrupulously honored, and his statements must be voluntarily made. Because he was told that he had to talk to the detectives and because the questioning took place shortly before an attorney was to be appointed, I would find the defendant's statements to be inadmissible.

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, vs. ROBERT EDWARDS aka WILLIE BAREFIELD, Appellant.	No. 3957 ORDER REMANDING FOR RESENTENCING ON MURDER CONVICTION (MANDATE)

Appeal from the Superior Court of Pima County Number 30683
Honorable Ben C. Birdsall, Judge

Bruce E. Babbitt, Former Attorney General
Robert K. Corbin, The Attorney General
by William J. Schafer, Assistant Attorney General
Crane McClennen, Assistant Attorney General

Attorneys for Appellee

Molloy, Jones, Donahue, Trachta & Childers
by Michael J. Meehan

Attorneys for Appellant

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its Opinion. It is accordingly ORDERED that the murder conviction of the trial court entered in the above-entitled cause be remanded for resentencing pursuant to State v. Watson, to comply with the opinion of this Court, attached hereto.

DONE IN OPEN COURT this 27th day of March, 1979.

STATE OF ARIZONA
SUPREME COURT

I, CLIFFORD H. WARD, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the

Order Remanding For Resentencing On Murder Conviction, made and entered in the above entitled cause by said Court on the 27th day of March, 1979.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of said Court this 2nd day of May, 1979.

CLIFFORD H. WARD, Clerk

By Mary Ann Hopkins
Chief Deputy Clerk

cc: Hon. Robert K. Corbin, Attorney General; Stephen D. Neely, Pima County Attorney; Hon. Ben C. Birdsall, Judge; Hon. Harry Gin, Pima County Presiding Judge; Department of Corrections; Superintendent of Arizona State Prison; Michael J. Meehan, Esq., Molloy, Jones, Donahue, Trachta & Childers; Robert Edwards aka Willie Barefield; Jim I. Martin, Court Administrator for Pima County.

CLIFFORD H. WARD
CLERK

Supreme Court

STATE OF ARIZONA
Phoenix
85007

MARY ANN HOPKINS
CHIEF DEPUTY CLERK

May 2, 1979

STATE OF ARIZONA, Appellee, vs. ROBERT EDWARDS aka WILLIE BAREFIELD, Appellant.	Supreme Court No. 3957 Pima County No. 30683

The following action was taken by the Supreme Court of the State of Arizona on May 1, 1979 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Justice Frank X. Gordon, Jr. voted to grant.

Copy of Order Remanding for Resentencing on Murder Conviction enclosed herewith.

CLIFFORD H. WARD, Clerk
By Pat Goeller
Deputy Clerk

TO: Hon. Robert K. Corbin, Attorney General, 200 State Capitol, Phoenix, Arizona 85007 Attn: Crane McClennen, Esq.
Michael J. Meehan, Esq., Molloy, Jones, Donahue, Trachta, Childers and Mallamo, 33 North Stone Avenue, Tucson, Arizona 85701
Stephen D. Neely, Pima County Attorney, 111 West Congress Street, Tucson, Arizona 85701

REVIEWED
Docketed for per Journal.
1/ Cert by 6/1/22
Date 5/3/79 By

APPENDIX C

FILED
20 June 1979
JAMES N. CORBETT, Clerk
G. McInroy Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

BEN C. BIRDSALL
JUDGE/COURT COMMISSIONER

NO. A-30683

DATE 20 June 1979

THE STATE OF ARIZONA,
PLAINTIFF

David Berkman
PLAINTIFF'S ATTORNEY

ROBERT EDWARDS, aka WILLIE BAREFIELD
DEFENDANT

Michael Meehan
DEFENDANT'S ATTORNEY

MINUTE ENTRY

RESENTENCING:

Defendant present in custody.

Bruce Johnson reporting.

This is the time that the Court has set for Resentencing, the Resentencing is on Count One of the Indictment, MURDER IN THE FIRST DEGREE,

All parties being granted leave to address the Court, Mr. Meehan and Mr. Berkman do so.

The Defendant, Robert Edwards, was adjudged GUILTY of the crime of MURDER IN THE FIRST DEGREE following a jury verdict. The Court made Findings of Fact on June 15, 1977, and those Findings of Fact are confirmed again at this time, except that the Court is now entitled to consider any mitigating circumstances that appear in the entire record in this case.

THE COURT DOES FIND that there are mitigating circumstances and the mitigating circumstances are sufficiently substantial to call for leniency, and the Defendant's Sentence should be reduced from death to life imprisonment pursuant to the Statute for this offense.

IT IS ORDERED that the Sentencing of June 21, 1977, is SET ASIDE as to the Sentence of death on the conviction in Count One,

JAMES N. CORBETT Clerk

By G. McInroy
Deputy

APPENDIX D

MINUTE ENTRY

Page No. 2 Date 20 June 1979 Case No. A - 3 0 6 8 3

MURDER IN THE FIRST DEGREE, and the Defendant is Sentenced to LIFE IMPRISONMENT on that Count. The Sentence is to commence as of January 19, 1976, which is the first date that the Defendant was incarcerated on these charges. The Sentence is to also run concurrently with the Defendant's other Sentences in this case.

The mitigating circumstances which the Court Finds, and this is by special verdict of the Court, are: 1) that the Defendant had not intended to kill the victim of the murder, and: 2) that the death, although the Court is not setting aside the Findings that the Defendant could reasonably have foreseen that his conduct in the crime would cause or create a grave risk or cause death to another person, the death was one that was very unusual and not expected, and: 3) the offenses committed by the Defendant were committed with other persons. The Court believes that a sentence of death in this case for this Defendant would be disproportionate recognizing the disposition which has been made of the other Defendants who were involved in the crime. There is particularly one Defendant who testified and was given immunity by the State, whose conduct in the commission of the offense was more reprehensible than Mr. Edwards'.

Thereupon the Defendant is advised of his right to appeal this resentencing and appeal procedure. The Defendant signs and receives a copy of the Notice of Right to Appeal and Appeal Procedure form.

FILED IN COURT: Notice of Right to Appeal and Appeal Procedure form.

Ben C Birdsall
JUDGE

copies to:
Court Administrator
Hon. Ben C. Birdsall
County Attorney - D. Berkman
Molloy, Jones, Donahue & Trachta - Meehan
Adult Probation
Department of Corrections (1 certified)
Sheriff (2 certified)
Computer
Arizona State Prison (1 certified)
Appeals Desk
Newspaper
CVC

G. McInroy, Deputy Clerk.

REVIEWED
Docketed appeal - yes

ABBREVIATED RECORD REFERENCES

TRANSCRIPTS OF PRETRIAL MOTIONS

I M - March 2, 1977
II M - March 3, 1977
III M - March 4, 1977
IV M - March 7, 1977
V M - March 2, 1977
March 11, 1977
March 14, 1977
March 16, 1977
VI M - March 22, 1977

TRIAL TRANSCRIPT PROCEEDINGS (MISTRIAL)

I P - March 17, 1977
March 18, 1977
II P - March 21, 1977
III P - March 22, 1977
IV P - March 24, 1977
March 28, 1977

TRIAL TRANSCRIPT PROCEEDINGS (SECOND TRIAL)

I Tr. - April 20, 1977
II Tr. - April 21, 1977
III Tr. - April 22, 1977
IV Tr. - April 25, 1977
V Tr. - April 26, 1977
April 27, 1977

POST-TRIAL MOTIONS AND SENTENCING

May 16, 1977
May 23, 1977
May 26, 1977
June 2, 1977
June 8, 1977
June 10, 1977
June 15, 1977
June 21, 1977

TRIAL COURT PLEADINGS

R. (With index number to appellate record)

APPENDIX

Supreme Court, U.S.
FILED
JUN 30 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5269

ROBERT EDWARDS, PETITIONER

v.

THE STATE OF ARIZONA, RESPONDENT

ON WRIT OF CERTIORARI TO
THE ARIZONA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI
FILED AUGUST 28, 1979
CERTIORARI GRANTED MAY 19, 1980

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[Caption omitted]

MINUTE ENTRY
(March 11, 1977)

UNDER ADVISEMENT RULING RE DEFT. EDWARDS' MOTION TO SUPPRESS:

IT IS ORDERED the motion is granted.

THE COURT FINDS that Deft. Edwards' statement was voluntary except for the violation of Miranda. The court is prohibiting the state from using the statement in the presentation of its case but the state may use the statements on cross-examination in the event Deft. Edwards takes the stand and the state may use the statement in rebuttal should it become otherwise material and proper rebuttal.

THE COURT FINDS that the officers' testimony is the credible evidence on the motion, not Deft. Edwards' testimony.

THE COURT FINDS that the deal referred to in the testimony, so far as Mr. Edward's state of mind is concerned, was that he would make a statement (presumably a true statement) in exchange for some leniency or something of that nature.

THE COURT FINDS that under Miranda and under the Sixth Amendment, there is at least an indication in some way that Mr. Edwards intended to have an attorney and intended not to make any statement until he was represented by counsel, the conversation between the officers and Mr. Edwards having been terminated by Mr. Edwards saying, in effect, that he would wait until he got his attorney begore he made any deal.

The court cites the Arizona cases it has studied in this regard: State v. Suave, State v. Edwards, State v. Berger.

[Caption omitted]

MINUTE ENTRY
(March 14, 1977)

RE STATE'S MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO SUPPRESS CONFESSION:

Mr. Lingeman files a written motion and counsel argue the motion to the court.

IT IS ORDERED the motion to reconsider is granted.

The court states that it was not aware of State v. Travis and it appearing that the case is exactly on point and is controlling,

IT IS ORDERED the ruling on the motion to suppress is changed and the Deft. Edwards' motion to suppress statements is denied as to all statements.

THE COURT FINDS the defendant's statements to be voluntary.

(CAPTION OMITTED)

No. A-30683

MOTION TO SUPPRESS STATEMENT

COMES NOW the defendant, ROBERT EDWARDS, by and through his attorney, HIRSH, SHINER & POLIS, P.C., and moves this Court to exclude the confession attributed to this defendant on the following grounds:

(1) That said confession was not made by this defendant.

(2) That the confession was made involuntarily by reason of threats and promises on the part of state agents. *Molloy v. Hogan*, 378 U.S. 1 (1964).

(3) That the confession was taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) insofar as it was made at a time when defendant had no understanding of his Fifth Amendment privilege against self incrimination.

These grounds will be more fully articulated in a following memorandum in support of this motion.

(CAPTION OMITTED)

No. A-30683)

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS STATEMENT

MEMORANDUM OF POINTS AND AUTHORITIES

On January 19, 1976 Defendant Edwards was arrested at his residence by Detective Bunting and Sergeant Bunting on charges of felony murder, armed robbery and armed burglary in connection with an incident alleged to have occurred on October 9, 1974. Later that day, Defendant Edwards gave a recorded statement to Sergeant Bunting denying any involvement in the occurrence in question. A transcription of this statement is included in the state's disclosure material.

The next day, January 20, 1976, Detective Marmion contacted the accused at the County Jail where the defendant was in custody. This contact took place at one of the attorney interview booths at approximately 9:15 A.M. During that interview, Detective Marmion attributes the following statement to Edwards:

> "Barfield was at Soto's residence approximately three or four days before the actual incident. Reed and Soto were talking about setting up the robbery. At that time Barefield decided to go along with them. On the night of the murder, October 9, 1974, at approximately 0030 hours Reed, Barefield, Soto and both Williams' arrived in the area of the La Conga. After the customers left the bar at approximately 0100 hours Manny Soto walked up to the window of the bar located on the southside and looked to see where the victim and Nellie Esparza were. Soto, Albert Williams and Willie Williams acted as look-outs. As the victim and Mrs. Esparza walked out the front door of the bar they were approached by Barefield and Reed. Reed was the only one carrying a gun. Both the victim and Mrs. Esparza were held at gun-point and were eventually forced back into the bar. Once inside Barefield stated he went to the victim's but did not

take anything from her. Shortly thereafter Reed fired two or three shots because the gun 'had a hair trigger on it'. Reed then took the victim back into the back room where the safe was at. Barefield stated Soto had told them where the safe was at because he had been in there once before while he committed a burglary at La Conga. Barefield denied hurting or knocking Mrs. Esparza to the floor. Barefield then grabbed Mrs. Esparza and took her into the back room where Reed had the victim at gun-point. The victim was sitting on a chair, he was bent over opening the safe. Reed threatened to kill the victim if he did not get the money out of the safe. Barefield also stated Reed was jabbing him in the rib area and had also jabbed the victim on the right neck area. Reed took the victim's watch, and ring off of his person. Barefield described the victim's ring as gold in color with a red ruby stone. Reed also took a metal box (money) out of the safe and two money bags. Barefield stated Reed kept possession of all the stolen items except the ring which he gave Barefield. The two suspects then ran from the bar and while they were running they were met by the other three suspects. The direction of travel the suspects took according to Barefield was consistent with what Reed had previously told me."

This statement was supposedly made after Detective Marmion played ten to twelve minutes of a recorded statement of codefendant Soto seriously implicating Edwards in the robbery in question. After the recording was played, Edwards allegedly agreed to make the aforementioned statement, but refused to have it recorded because he knew it would be used against him in Court at a Later time'. Defendant at this time allegedly had been advised of his Miranda rights and affirmatively stated he understood them.

I.

DEFENDANT EDWARD'S CONFESSION WAS OBTAINED IN VIOLATION OF MIRANDA V. ARIZONA

In leading case of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) holds that a statement elicited through

custodial interrogation is inadmissable at trial unless the state can show that the defendant was advised of his Miranda rights and validly waived them. Furthermore, the court in Miranda specifically held that a "valid waiver will not be presumed simply from the silence of the accused or simply from the fact that a confession was eventually obtained". *Miranda v. Arizona, supra,* 384 U.S. at 475. Emphasizing the importance of the requirements spelled out in its opinion, the court concluded that:

> "The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Id.* at 384 U.S. 476.

Defendant here does not contest the fact that he was advised of his rights after he was arrested. Instead, it is defendants position that he did not validly waive his rights and that, therefore, his statement was involuntarily made and was elicited in violation of the dictates of *Miranda v. Arizona, supra.* The invalidity of the waiver in this case is manifested by the interrograting officers admission that defendant Edwards would not agree to a tape recording of the confession attributed to him because they could use it against him if it were tape recorded.

This refusal is analogous to the refusal made by the defendant in *United States v. Frogier,* 419 F. 2d 1161 (D.C. Cir. 1969) which held that a defendant's objection to note taking by officers before confessing rendered invalid a written waiver signed by the defendant. This holding was predicated on the reasoning that Frozier's ban on note taking indicates an unintelligent waiver of his rights under Miranda. In like fashion, defendant Edwards refusal to give a taped statement indicates that any waiver of his Miranda rights is undermined by the fact it was unintelligently made. *Accord, State v. Jones,* 37 Ohio State 2d. 21, 306 N.E. 2d 409 (1974).

(CAPTION OMITTED)

No. A-30683

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS STATEMENTS

MEMORANDUM OF POINTS AND AUTHORITIES

I.

DEFENDANT EDWARDS' ORAL CONFESSION WAS OBTAINED DURING AN INTERROGATION SESSION CONDUCTED AFTER DEFENDANT EDWARDS HAD INVOKED HIS PRIVILEGE AGAINST SELF-INCRIMINATION AND ASKED FOR AN ATTORNEY. THEREFORE, THIS CONFESSION WAS OBTAINED INVOLUNTARILY AND IN VIOLATION OF DEFENDANT'S 5TH, 6TH, AND 14TH AMENDMENT RIGHTS. *MIRANDA v. ARIZONA*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

On January 19, 1976, Defendant Edwards was arrested at his home by Detective Bunting and Sargeant Bunting on charges of murder, armed robbery and armed burglary in connection with an incident alleged to have occurred on October 9, 1974. Later that afternoon, defendant Edwards volunteered a recorded statement denying any involvement in the occurrance at question. This recorded statement, which is transcribed in the State's disclosure, indicates that Detective Bunting engaged into a searching inquiry into the particulars of defendant Edwards' recorded statement relative to an alibi.

After this statement was made the tape recorder was turned off and questioning continued. According to Sgt. Bunting, defendant stated that he wanted to make a deal but after negotiations broke down, defendant stated that he would get himself a lawyer and then make a deal.

During these negotiations, Detective Bunting indicated to defendant Edwards that if he wanted to make a statement, Detective Bunting would listen to it and then con-

sider whether a deal was to be made. In response to that, Edwards stated, according to Detective Bunting, that he was not going to make a statement, that he wanted a deal, and when Detective Bunting refused to make an offer, negotiations finally terminated.

It should be noted here that during the course of this interrogation session, Detective Hallums also talked to defendant Edwards, but again, defendant Edwards made no statements. Finally, after the termination of negotiations on January 19, 1976, defendant Edwards was transported to the County Jail.

The next day, January 20, 1976, Detective Victor Marmion went to the jail to interrogate defendant Edwards. During this interrogation session, Detective Marmion confronted Edwards with a tape-recording made by co-defendant Soto implicating defendant Edwards in the crime at issue. Simultaneously, he advised defendant Edwards of his Miranda rights and defendant Edwards allegedly responded that he would make a statement but that he did not want to have it recorded. According to Detective Marmion, defendant Edwards then proceeded to make what amounts to an oral confession concerning his involvement in the crime in question.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), the United States Supreme Court outlined the procedure that police must follow once they have advised the defendant of his *Miranda* rights.

> "If the individual indicates in any manner at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice and producing a statement after the privilege has been once invoked." 384 U.S. at 473–74, 86 S.Ct. at 1627–28.

Following the Miranda decision, the United States Supreme Court in *Michigan v. Moseley*, ____ U.S. ____, 96 S.Ct. 321 (1975), reaffirmed the holding in *Miranda* and stated that the admissibility of a statement obtained after the in-custody defendant had exercised his *Miranda* rights depends upon whether his right to cut off questioning was "scruplulously honored". In *Mosely* the defendant, after being advised of his rights, stated he did not want to answer any questions about some specific crimes under investigation. All questioning ceased. Later, the accused was interrogated by another detective and again advised of his *Miranda* rights. This interrogation related to a homocide, a case indepedent of those about which the accused was questioned in the first interrogation session. This time, the accused elected to answer questions. This statement was held to be admissible because the second interrogation session did not undercut the accused previous decision not to answer questions concerning particular offenses.

In *State v. Sauve*, 112 Ariz. 576, 544 P.2d 1091 (1976), the Arizona Supreme Court distinguished *Mosely* in a case where multiple interrogation sessions resulted in the police obtaining a confession from the accused. In *Sauve, supra*, the defedant was arrested, given his *Miranda* warning and subjected to interrogation. After defendant was given his *Miranda* warning, he was asked whether he wanted to talk about the alleged crime and responded "no". However, after one of the detectives pointed to a box containing items taken in the burglary and stated that he had a good case against the defendant, defendant allegedly orally admitted that his fingerprints could be found on the stolen property. Under these circumstances, the Arizona Supreme Court held that the officer's actions undercut the defendant's previous decision to invoke his *Miranda* rights and that, therefore, the statements were not admissible. *State v. Sauve, supra*, at 579.

The facts of this case are even more compelling on the issue of whether defendant's statement was voluntered and hence, admissible. Defendant Edwards at the first in-

terrogation session, agreed to have his alibi statement recorded. After this statement was made and recorded, negotiations were undertaken to determine whether a "deal" could be made. When negotiations broke down, defendant Edwards refused to make a statement. Furthermore, he stated that he would wait until he got an attorney until he made a deal, thereby implying that he requested the services of an attorney before proceeding with any further interrogation by the police. In the face of defendant's refusal to make a statement concerning any involvement he had in the offense and his desire to speak with an attorney, the interrogating officers decided to transport him back to the jail. The next day, another detective from the homocide division went to the jail to interrogate defendant Edwards. First, he read him his *Miranda* rights. Then he proceeded to play a tape recording of a confession of a co-defendant implicating defendant Edwards in the crime at issue. Immediately after the playing of this tape, defendant Edwards allegedly orally confessed to the crime at issue, although it is clear from the State's disclosure that he refused to have this statement tape recorded and believed that this statement, if indeed made, was not admissible against him.

Under these circumstances, it is clear that this subsequent interrogation session undercut defendant's previous decision to invoke his Miranda rights under the 5th, 6th and 14th Amendments and, for that reason, the oral confession atttributed to him must be held inadmissible at his trial. *State v. Sauve, supra.*

(CAPTION OMITTED)

NO. A-30683

OPPOSITION TO DEFENDANTS' MOTION TO SUPPRESS

COMES NOW the State of Arizona, by and through the Pima County Attorney, STEPHEN D. NEELY, and his Deputy, LARRY J. LINGEMAN, and respectfully opposes defendants' motions to suppress for the reason that they inaccurately and inadequately set forth the facts upon which the motion can be made.

Respectfully submitted this 4th day of January, 1977.

(CAPTION OMITTED)

NO. A-30683

MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO SUPPRESS CONFESSION

COMES NOW the State of Arizona, by and through the Pima County Attorney, STEPHEN D. NEELY, and his deputy, LARRY J. LINGEMAN, and moves this Court to reconsider its decision granting the defendant's motion to suppress for the reason that the State's attorney has found a case which specifically deals with the problem before the Court in this motion, *State v. Travis*, 26 Ariz. App. 24 (1976).

Respectfully submitted this 11th day of March, 1977.

(CAPTION OMITTED)

No. 3957

HAYS, Justice

This is an appeal by Robert Edwards from his convictions of robbery, burglary, and first degree murder, and from his sentence of death for the murder conviction. We have jurisdiction pursuant to article 6, § 5 of the Arizona Constitution and A.R.S. § 13-4031. We affirm the convictions and sentences for robbery and burglary, and the murder conviction, but remand the murder conviction for resentencing.

We are presented with nine issues on appeal:

1. Whether Edwards' confession was admissible;
2. Whether, in deference to Edwards' right to a speedy trial, the state must forego its right to file a special action when a speedier alaternative is available;
3. Whether Edwards' right to a speedy trial was violated;
4. Whether Edwards' trial in prison garb, over his objection, violated his right to due process;
5. Whether the preclusion of a defense witness was an abuse of discretion;
6. Whether the prosecutor's statements in his closing argument constituted an impermissible comment on Edwards' failure to take the stand;
7. Whether an unintended or accidental death may be the basis for a felony murder conviction;
8. Whether A.R.S. §13-1641 (now renumbered as § 13-116) precludes conviction and punishment for robbery and burglary in addition to first degree murder when the latter is a felony murder; and
9. Whether there was sufficient evidence of causation in the record to support the felony murder conviction.

In October, 1974, a bar in Tucson was robbed at gunpoint. During the robbery the proprietor suffered a fatal heart attack. After obtaining some money and valuables the robbers fled. The police investigated the crime but soon exhausted all leads. In January, 1976, they obtained information that led to the arrest of Edwards and several co-conspirators. Edwards was subsequently convicted of robbery, burglary, and first degree murder.

CONFESSION

Edwards was arrested at his home at 4:00 P.M. He was not read the *Miranda*[1] warnings at that time nor did he make any statements, but was taken to the police department where he was read his rights. He indicated he understood them and that he would submit to questioning. After again having his rights explained to him, he was interrogated by a detective who told him that a co-conspirator had implicated him in the robbery of a Tucson bar. Edwards denied involvement and gave a taped alibi statement, at the beginning of which he was again read his rights. After the statement, he asked the detective if he could make a deal. The detective replied that he wanted a statement but that he could make no deals. Consequently, Edwards asked to talk to the county attorney about making a deal, which he was allowed to do. The negotiations were unsuccessful. Edwards then reapproached the detective about a deal. The detective repeated his earlier statement that he could make no deals, to which Edwards replied, "I want an attorney before making a deal." He did not indicate, however, nor did the detective interpret his statement to mean that he wanted an attorney before further interrogation or that he wished to remain silent thereafter. The detective, nevertheless, ceased questioning immediately after Edwards' statement at about 6:30 P.M. Thereafter, Edwards was taken to the county jail.

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

At 9:15 the next morning two other detectives arrived at the jail and asked to see Edwards. Although they were from the same section as the detective who had questioned Edwards the day before and knew that he had been questioned, they did not know that he had made the statement about an attorney. When the detention officer told Edwards that the detectives were there to see him, he told the officer that he did not wish to speak to anyone. The officer told him that he had to. Edwards was thereupon taken to see the detectives. They identified themselves and said they wanted to talk to him. At that point they explained to him that he had the right to remain silent and the right to an attorney and the other *Miranda* rights. Edwards said that he was willing to talk to them but that he first wanted to hear the taped statement of his co-conspirator that the detective had told him about the day before. After a portion of the tape was played, he told the detectives that he would make a statement but that he did not want it recorded becuase it could be used against him in court. The detectives throughly explained that whether or not the statement was recorded did not matter because an oral statement could also be used against him in court. Edwards replied "I'll tell you anything you want to know, but I don't want it on tape." Edwards then gave a statement indicating his involvement in the robbery. The interrogation concluded at 10:30 A.M. Prior to trial, Edwards moved to suppress the confession and a hearing was held. The court found that the statement was voluntarily given but that the detectives violated *Miranda* when they reapproached Edwards after his statement about an attorney. However, the next day the judge reversed his ruling based on State v. Travis, 26 Ariz. App. 24, 545 P.2d 986 (1976), and found the confession to be admissible substantively.

Edwards claims on appeal that he exercised both his right to an attorney and his right to remain silent, that he did not subsequently waive either right, and that in any case his statement was not intelligently made and was therefore involuntary. First, we must determine whether, having initially waived his rights, Edwards adequately re-

claimed them by declaring that he would wait to talk to an attorney before making a deal.

Invocation of Previously Waived Miranda Rights

Miranda v. Arizona, 384 U.S. 436, 444–45, 86 S.Ct. 1602, 1612, 16 L.Ed. 2d 694, 706–07 (1966), holds that if a defendant indicates "in any manner" that he wishes an attorney before speaking or that he does not wish to be interrogated further, questioning must cease. Edwards points to this language in *Miranda* and argues that his statement was adequate to raise both his right to an attorney and his right to remain silent.

The state argues, however, that by stating he wanted to see an attorney before making a deal, Edwards was not raising his right to an attorney as such, nor saying that he wished to remain silent, but only asserting that he wanted to see an attorney before talking anymore about a deal. For this proposition, the state relies on State v. Travis, *supra*. There, after the defendant had been arrested and read his rights, he made equivocal statements about desiring an attorney. A detective asked him if he would submit to a breathalyzer test and allow the interview to be recorded. The defendant responded that he wanted to seek the advice of counsel before granting either request. The detective then told him that his wife had died and that he would now be charged with first degree murder. The defendant broke down and confessed his involvement. In ruling that his confession was admissible, the court reasoned that the defendant never made a definite statement to the effect that he either wanted to talk to an attorney before answering questions or preferred that questioning cease. *Id.* at 29, 545 P.2d at 991.

Notwithstanding the "in any manner" language of *Miranda, supra,* we are convinced that *Miranda* was not intended to require that every reference to an attorney, regardless of its ambiguity, must be construed as an invocation of the *Miranda* rights.[2] We think *Travis* is correct

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[2] *Miranda* itself would seem to concede as much by indicating its approval of the policy of the Federal Bureau of Investigation that the

in looking at a statement in the context made and attempting to determine whether it is sufficiently clear to be fairly interpreted as a request for an attorney or a demand that interrogation cease. There is much authority in support of this view. *See, e.g.*, United States v. Rodriguez-Gastelum, 569 F.2d 482, 484 (9th Cir.), *cert. denied*, 436 U.S. 908, 98 S.Ct. 2266, ___ L.Ed.2d ___ (1978); United States v. Tokoph, 514 F.2d 597, 605 (10th Cir. 1975); United States v. Howard, 470 F.2d 406, 407-08 (D.C. Cir. 1972); State v. Knapp, 114 Ariz. 531, 538, 562 P.2d 704, 711 (1977), *cert. denied*, ___ U.S. ___, 98 S.Ct. 1458, ___ L.Ed. 2d ___ (1976); State v. Garrison, 519 P.2d 1295, 1300-01 (Or. App. 1974).

Applying this reasoning in an evaluation of Edwards' statement, it appears at first blush that the state's argument is correct, *i.e.*, that Edwards was saying that he desired an attorney only if a deal was discussed further. However, looking at the statement in the context made, we find such an interpretation erroneous.

To accept the state's position in this case and allow Edwards' confession to stand while holding that he asked for an attorney for the limited purpose of making a deal would be illogical. Edwards wanted an attorney before making a deal. His part of the deal would have been his confession. Therefore, to allow him to make a confession without counsel would be to deny him his right to counsel for the very purpose, albeit limited, for which it was invoked. Likewise, it would be just as illogical to hold that his statement was enough to invoke his right to remain silent only if questioned about a deal. We hold therefore, looking at Edwards' statement in the context made, that although it was equivocal, its meaning was sufficiently clear and therefore it must be interpreted as a request for counsel and as a request to remain silent until counsel was present.

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initial decision as to whether, in an ambiguous statement, the defendant has asked for an attorney is for the agent on the scene. *See* 384 U.S. at 485-86 & n. 55, 86 S.Ct. at 1633-34 & n. 55, 16 L.Ed.2d at 729-30 & n. 55.

We must now determine whether, after invoking his right to counsel and right to remain silent, Edwards waived them. Our discussion at this point is twofold: first, whether *Miranda* creates a per se rule against waiver of the right to an attorney or the right to remain silent after being invoked; and whether the waiver, if constitutionally permissible, was voluntary.

Per Se Rule Regarding Right to Attorney

Edwards argues that *Miranda* creates a per se rule that once a defendant invokes his right to counsel he may not then be questioned again by police until an attorney is present. We do not agree. Although *Miranda* does require that questioning cease after a defendant asks for an attorney, we do not believe it precludes the defendant from changing his mind either on his own or in response to an inquiry by police so long as the decision is voluntarily made. We agree with the Ninth Circuit decision in United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir.), *cert. denied*, 436 U.S. 908, 98 S.Ct. 2266, ____ L.Ed. 2d ____ (1978), that per se rules often cause a court to lose touch with the purpose behind the rules. The goal of *Miranda* is to insure that the right to an attorney and the right to remain silent are not reduced to meaningless phrases as the result of overzealous police practices. 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed. 2d at 706. However, "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity and *deprive suspects of an opportunity to make informed and intelligent assessments of their interests.*" (Emphasis added.) Michigan v. Mosley, 423 U.S. 96, 102, 96 S.Ct. 321, 326, 46 L.Ed.2d 313, 320 (1975). Reading *Miranda* to create such a per se rule would preclude a defendant, upon intelligent reflection, from voluntarily and knowingly acting as he thinks best. It would work to "imprison a man in his privileges." Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280, 63 S.Ct. 236, 242, 87 L.Ed. 268, 275

(1942). We therefore hold, as did the Ninth Circuit in Rodriguez-Gastelum, *supra*, that *Miranda* does not create a per se rule precluding a defendant from initiating further discussions with police or from responding to subsequent inquiries from police after the right to an attorney has been invoked so long as the waiver is otherwise voluntary.

Per Se Rule Regarding Right to Remain Silent

Edwards also claims that *Miranda* creates a per se rule against questioning by police after the defendant has invoked his right to remain silent. We previously rejected this assertion in State v. Hatton, 116 Ariz. 142, 568 P.2d 1040 (1977), where the defendant, having invoked his right to remain silent, was twice reapproached by the police and interrogated. Citing Michigan v. Mosley, 423 U.S. 96, 102-03, 96 S.Ct. 321, 326, 46 L.Ed. 2d 313, 321 (1975), for the proposition that *Miranda* cannot be interpreted to "create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject," we held that the questioning of the defendant by police was permissible since the defendant's right to cut off questioning was scrupulously honored. 116 Ariz. at 146, 568 P.2d at 1044. We find *Hatton* controlling. Since, as in *Hatton*, Edwards was reminded of his *Miranda* rights and was asked by the detectives if he would voluntarily make a statement, we conclude that his right to cut off questioning was scrupulously honored.

Voluntariness of Waiver

Finally, Edwards claims that his confession was involuntary since it was not knowingly made. In Arizona, confessions are prima facie involuntary and the burden is on the state to show by a preponderance of the evidence that the confession was freely and voluntarily made. State v. Hall, ____ Ariz. ____, 586 P.2d 1288 (1978). In determining the voluntariness of a confession, the trail court must look to the totality of the circumstances surrounding the confession and decide whether the defendant's action is knowing and intelligent and whether his will has been overborne. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct.

2041, 2047, 36 L.Ed. 2d 854, 862 (1973); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, ____ U.S. ____, 98 S.Ct. 1458, ____L.Ed. 2d ____ (1978). Once the court finds, as it did in this case, that the confession is voluntary, the finding will not be upset on appeal absent clear and manifest error. State v. Edwards, 111 Ariz. 357, 361, 529 P.2d 1174, 1178 (1974). We find no such clear and manifest error.

Edwards claims that his comment "I'll tell you anything you want to know, but I don't want it on tape" reveals his misunderstanding of the use of the confession he gave and that therefore it was not knowingly given. The state argues that the admissibility of an oral statement was thoroughly explained and that he refused to have it recorded for reasons of his own, *i.e.*, because of the impression he received after just having listened to his co-conspirator's taped confession. In any case, recognizing that the trial court found that Edwards' statement was voluntarily and knowingly made, and applying the rules of law set out above, we cannot say that the courts finding was clearly and manifestly erroneous.

In conclusion, we find that Edwards did invoke his right to an attorney and his right to remain silent even though his statement was not altogether clear. We also find, however, that the question whether he waived them is not amenable to a per se rule and thus is left to the trial court whose decision must be guided by the rules for determining voluntariness. The trial court's finding that the waiver and confession were voluntarily and knowingly made is upheld.

Written Waiver Requirement

Edwards claims that even if he did waive his *Miranda* rights, 17 A.R.S. Rules of Criminal Procedure, rule 6.1(c), indicates that a waiver of the right to counsel is ineffective unless made before a judge and in writing. We do not agree.

Although rule 6.1 can be read as Edwards reads it,[3] it was not intended to require judicial presence and written waiver of counsel before custodial interrogation nor have we ever required such in order for the defendant to waive his right to an attorney during custodial interrogation. *See, e.g.*, State v. Hall, ____Ariz. ____, 586 P.2d 1288 (1978); State Ferguson, 119 Ariz. 55, 579 P.2d 559 (1978); State v. Arnett, 119 Ariz. 38, 579 P.2d 542 (1978); State v. Ramirez, 116 Ariz. 259, 569, P.2d 201 (1977); State v. Hatton, 116 Ariz. 142, 568 P.2d 1040 (1977); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, ____ U.S. ____, 98 S.Ct. 1458, ____ L.Ed. 2d ____ (1978); State v. Jenkins, 111 Ariz. 13, 522 P.2d 1090 (1974). We therefore hold that rule 6.1(c) does not require that a waiver of a defendant's right to an attorney at custodial interrogation be in writing or before the court.

SPEEDY TRIAL

Edwards raises two distinct arguments regarding his right to a speedy trial: first, that the state is required by 17 A.R.S. Rules of Criminal Procedure, rule 8, to forego

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[3] 17 A.R.S. Rules of Criminal Procedure, rule 6.1, provides in relevant part:

> a. Right to be Represented by Counsel. A defendant shall be entitled to be represented by counsel in any criminal proceeding, except in those petty offenses such as traffic violations where there is no prospect of imprisonment or confinement after a judgment of guilty. The right to be represented shall include the right to consult in private with an attorney, or his agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.
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> * * *
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> c. Waiver of Rights to Counsel. A defendant may waive his rights to counsel under (a) and (b), in writing, after the court has ascertained that he knowingly, intelligently and voluntarily desires to forego them. When a defendant waives his rights to counsel, the court may appoint an attorney to advise him during any stage of the proceedings. Such advisory counsel shall be given notice of all matters of which the defendant is notified.

use of a special action when another procedural option is available whether or not the trial proceedings have been stayed; and second, that the delay with its allegedly resulting prejudice denied him his sixth amendment rights.

Rule 8 Violation

Edwards was arraigned on January 23. On March 5, Edwards moved for a redetermination of probable cause. The court granted the motion on March 22 finding that the state had failed to reveal all exculpatory information in its possession to the grand jury, but also finding that the state had not acted in bad faith. At that point, the state could have reindicted Edwards or it could have challenged the trial court's ruling by special action. It chose the latter alternative by filing a motion to stay and a special action. The court of appeals granted the stay but denied relief and later denied a motion for rehearing. The state then petitioned this court for review which was denied on July 20. On July 30, Edwards was reindicted following a determination by the grand jury that probable cause existed.

Edwards argues that the state should simply have reindicated him pursuant to the trial court's order rather than seeking appellate relief and that since it chose the more time-consuming procedure, the resulting period of delay (about four months) should be included in the rule 8 speedy trial time periods time periods. We do not agree for two reasons.

First, there was a stay in effect during the period of the appeal that necessarily halted all proceedings in the trial court. Such a period is excluded time under rule 8. State v. Steele, 23 Ariz. App. 73, 76, 530 P.2d 919, 922 (1975). Second, to require the state to employ the less time-consuming procedure when another is authorized by law would deprive the state of a legitimate remedy. Where, as here, there is no showing that the state's action was frivolous or taken in bad faith with intent to delay the defendant's trial, we think a rule limiting the options available to the state is wholly inappropriate. Computing the time involved while excluding the time taken by the appeal, the defendant had not, as of the date of his reindict-

ment, been denied a speedy trial inviolation of rule 8. Finding that no violation had occurred to that point, and noting that the speedy-trial limits begin again following reindictment, State v. Soto, 117 Ariz. 345, 348, 572 P.2d 1183, 1186 (1977), and since Edwards alleges no subsequent speedy-trial violation unless the earlier period is included, we find that rule 8 was not violated.

Sixth Amendment Speedy-Trial Violation

Edwards alleges that he was denied his constitutional right to a speedy trial by his lengthy incarceration while awaiting trial. He was arrested on January 19, 1976 and finally went to trial on March 17, 1977, a delay of 14 months. In State v. Soto, 117 Ariz. 345, 572 P.2d 1183 (1977), we held that a delay of nine months was sufficient to trigger further inquiry into the trial delay. That inquiry focuses on four factors set out by the Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 83 L.Ed. 2d 101 (1972);

1. The length of the delay.
2. The reasons for the delay.
3. The defendant's assertion of his right
4. The prejudice caused the defendant.

Of these factors, the first is least important while the last is most important. State v. Soto, *supra*.

Delay

A 14-month delay seems to be excessive, but without looking into the reasons for the delay, we cannot conclude that the delay was prejudicial per se.

Reason for Delay

Only four months of the 14-month delay was caused by the state. Edwards claims that the state should be chastised for using four months to appeal an order when it could have simply reindicted as it ultimately was required to do. He cites United States v. Perry, 353 F. Supp. 1235, 1237 (D.D.C. 1973), as authority for his position. There, the court did criticize the prosecution for delaying trial, but because it had taken fourteen months for appeals which could have been completed in four (as they were

here), not because the state had chosen to appeal. On the other hand, in United States v. Osuna-Sanchez, 446 F.2d 566 (9th Cir. 1971), *cert. denied*, 404 U.S. 1022, 92 S.Ct. 698, 30 L.Ed.2d 672 (1972), the court looked at the diligence of the prosecution in the appeal process and held that a six-month delay because of the appeal did not violate the defendant's right to a speedy trial.

Edwards attempts to distinguish *Osuna-Sanchez*, *supra*, and similar cases, *e.g.*, People v. Stewart, 61 Mich. App. 167, 232 N.W.2d 347 (1975), that approve the use of interlocutory appeals by the state by pointing out that these cases involve appeals from trial court orders suppressing prosecutor's evidence and were therefore absolutely necessary to the prosecution's cases. We are not inclined to accept this distinction nor hold that the state's right to challenge an adverse trial court ruling by special action prior to a criminal trial is limited to those situations in which it is absolutely necessary, at least in the absence of any evidence in the record to show that the appeal was frivolous or taken in bad faith with the intent to delay the trial.

Defendant's Assertion of Right

Although the state argues to the contrary, we find after examining the record that Edwards did adequately and repeatedly assert his right to a speedy trial.

Prejudice to Defendant

Edwards claims that he was prejudiced by the delay because he was not able to locate two alibi witnesses essential to his defense. We do not believe the record supports Edwards' claim of prejudice for the following reasons. Edwards made no offer of proof to the court of the alleged testimony of the alibi witnesses had they been located. Nor did he show that the witnesses would have been available if the state had not delayed the trial for four months. He called one alibi witness in whose *sole* presence he claimed he was during the robbery. He was granted numerous continuances in order to locate the witnesses and the court issued several requests for attendance of witnesses to one state in which it was thought the witnes-

ses were residing. The state had never interviewed the witnesses nor did it know where they lived.

Although we recognize that these witnesses may have aided Edwards at trial, we cannot say that their absence prejudiced him to such an extent that he was denied a fair trial. He is, after all, entitled to a fair trial, not a perfect one. Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed. 2d 476, 484 (1968). Since the court and the state did everything they could have done to locate the witnesses and since Edwards did not show that the witnesses would have been available without the delay caused by the state, we find that Edwards was not unduly prejudiced as a result of the delay. *See* State v. Watson, 114 Ariz. 1, 6, 559 P.2d 121, 126 (1976), *cert. denied*, 430 U.S. 986, 97 S.Ct. 1687, 52 L.Ed.2d 382 (1977); Sigard v. State, 537 S.W. 2d 736,739 (Crim. App. Tex. 1976).

Edwards also alleges other bases for prejudice. We have reviewed these claims and find them equally without merit. Therefore, having considered all the factors required by Barker v. Wingo, *supra*, we conclude that Edwards' constitught to a speedy trial was not violated.

PRISON GARB

Edwards claims he was denied the due process right to a presumption of innocence by being tried in prison garb, citing Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1961, 48 L.Ed.2d 126 (1976). In *Estelle*, the Supreme Court held that an accused may not be compelled against his will to go to trial in identifiable prison garb. Edwards' reliance on *Estelle* is misplaced. *Estelle* deals with the case in which the defendant was tried in *identifiable* prison garb. There is no indication in the record that Edwards' prison clothes were identifiable as such. No effort was made by defendant to make an offer of proof as to the identifiable nature of his clothes. It is well-settled law in Arizona that where the record is silent, the missing facts will be presumed to support the conviction. *E.g.*, State v. Caldwell, 117 Ariz. 446, 468, 573 P.2d 864, 868 (1977); State v. Williams, 113

Ariz. 442, 444, 556 P.2d 317, 319 (1976); State v. Bojorquez, 111 Ariz. 549, 553, 535 P.2d 6, 10 (1975).

PRECLUSION OF DEFENSE WITNESS

During the trial, Edwards attempted to call a witness that would have testified that he was intoxicated at 6:00 P.M., the night before the robbery. Even though Edwards was aware of both the witness and the intoxication defense long befgore trial, neither had been disclosed to the state. The state objected not only because Edwards had known of the witness and of the new defense before trial and had not disclosed them, but also because it believed that testimony of intoxication at 6:00 P.M. was not relevant to the defendant's participation in a robbery at 1:00 A.M. the next morning, seven hours later. The court excluded the witness as a sanction for Edwards' nondisclosure. Edwards argues that exclusion of the witness was an abuse of discretion by the trial court. We disagree.

We have repeatedly held that the imposition of a sanction pursuant to 17 A.R.S. Rules of Criminal Procedure, rule 15.7, is within the sound discretion of the trial court, and absent a showing of prejudice this court will not find an abuse of discretion. State v. Ramirez, 116 Ariz. 259, 268, 569 P.2d 201, 210 (1977); State v. Clark, 112 Ariz. 493, 495, 543 P.2d 1122, 1124 (1975). The prejudice must be such that the defendant has been denied a fair trial. *See* State v. Dorow, 116 Ariz. 294, 295, 569 P.2d 236, 237 (1977).

We do not believe that Edwards was prejudiced by the preclusion of the witness to such an extent that he was denied a fair trial. The testimony that he saw Edwards intoxicated some seven hours before the crime, although probably admissible, was not so dispositive that its absence denied Edwards a fair trial.

CLOSING ARGUMENT

As the prosecutor began his closing argument he wrote on a chalk board, "Defendant confessed." At the beginning

of Edwards' closing argument, Edwards, representing himself, wrote on the chalk board, "Defendant did not confess." He also told the jury during his closing argument that he did not confess to the detectives. In his rebuttal, the prosecutor made the following statements which Edwards characterizes as impermissible comments on his failure to take the stand but which the state characterizes as a justifiable response to Edwards' statements which were unsupported by the evidence before the jury:

> "'The evidence, you will recall, is what the witnesses say from the witness stand here under oath. And there is an important thing about witnesses and what they testify to. They are subject to cross-examination. That is, you can ask the witness, "Well, how do you remember that, Mr. Witness? How do you remember this, Mr. Witness? Isn't such and such true, Mr. Witness?"
>
> The witness answers you back. That's testimony. That's evidence.
>
> What evidence is there that he did not confess? Did any witness come in here and say from the witness stand under oath that there was no confession, there was no confession and the police are lying, there was no confession? That incident never occurred.
>
> No, ladies and gentlemen, nobody testified to that. No witnesses were called that testified about that confession not being made. No witnesses whatsoever.
>
> The most conclusive statement is his own statement. He never said he didn't confess other than writing it on the easel.
>
> He told you he wasn't involved in the crime, he wasn't guilty. Here he told you that like I'm telling you, like I'm talking to you, not under oath.'"

In determining whether these statements were improper, we must obviously examine them in the context made. *See* State v. Ramirez, 116 Ariz. 259, 263, 569 P.2d 201, 205 (1977). The state had introduced substantial evidence that Edwards had confessed, including the content of his confession. Edwards chose not to testify at trial. He had introduced no evidence whatsoever that he had not

confessed. Before the closing arguments he was warned by the judge not to make statements that were unsupported by the evidence before the jury. Nevertheless, he argued that he had not confessed and wrote "Defendant did not confess" on the chalk board.

Upon reviewing these circumstances, we conclude that Edwards' oral and written statements before the jury were improper since they were wholly unsupported by the evidence. State v. Dutton, 106 Ariz. 463, 465–66, 478 P.2d 87, 89–90 (1970). The prosecutor's statements were made in response to Edwards' argument. The error was invited by Edwards. He cannot now raise error that he invited hoping to benefit thereby. State v. Purcell, 117 Ariz. 305, 308, 572 P.2d 439, 442 (1977); State v. Wilcynski, 111 Ariz. 533, 535, 534 P.2d 738, 740, *cert. denied*, 423 U.S. 873, 96 S.Ct. 141, 46 L.Ed. 2d 104 (1975).

FELONY MURDER CONVICTION

Edwards argues that the death of the victim from a heart attack that occurred during the robbery may not form the basis of a felony murder conviction because it was unintended and accidental. The cases are to the contrary. In State v. Ferrari, 112 Ariz. 324, 328, 541 P.2d 921, 925 (1975), we noted that a murder that is committed in perpetration of a burglary or any other specifically named felony is punishable as felony murder whether wilful and premediatated or only accidental. *See also* State v. Hitchcock, 87 Ariz. 277, 350 P.2d 681 (1960), *cert. denied*, 365 U.S. 609, 81 S.Ct. 823, 5 L.Ed. 2d 821 (1961); People v. Stamp, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969), *cert. denied*, 400 U.S. 819, 91 S.Ct. 36, 27 L.Ed.2d 46 (1970); State v. McKeiver, 89 N.J. Super. 52, 213 A.2d 320 (1965).

Edwards also contends that a conviction and sentence for robbery, burglary, and murder violate the double-punishment statute, A.R.S. § 13–1641 (now § 13–116). In State v. Miniefield, 110 Ariz. 599, 603, 522 P.2d 25, 29 (1974), we held that convictions and sentences for both first degree murder and arson (the underlying felony) did

not violate A.R.S. § 13-1641. *Accord*, State v. Clayton, 109 Ariz. 587, 600, 514 P.2d 720, 733 (1973). We find these cases controlling.

SUFFICIENCY OF THE EVIDENCE

Edwards complains that there was not sufficient evidence on which the jury could find that the robbery caused the victim's death. We do not agree. A pathologist testifying for the state indicated that, in his expert opinion, the death resulted from a heart attack induced by the anxiety resulting from being robbed at gunpoint. He reiterated his opinion on cross and again on redirect. We think there was more than adequate competent evidence before the jury to support the causation element.

SENTENCING

Since Edwards was sentenced pursuant to the portions of A.R.S. § 13-454 which we held unconstitutional in State v. Watson, ____ Ariz. ____, 586 P.2d 1253 (1978), *cert. denied*, ____ U.S.L.W. ____, this case is remanded for resentencing.

We have reviewed the entire record for fundamental error and have examined all arguments raised by Edwards and find that he was not denied a fair trial. The convictions for robbery, burglary, and first degree murder are affirmed along with the sentences for robbery and burglary. The murder conviction is remanded for resentencing pursuant to State v. Watson, *supra*.

CONCURRING: JACK D. H. DAYS, JUSTICE

JAMES DUKE CAMERON, Chief Justice

FRED C. STRUCKMEYER, JR., Vice Chief Justice

WILLIAM A. HOLOHAN, Justice

GORDON, Justice (Dissenting):

The majority opinion states that *Miranda* does not place a per se ban on police questioning of a suspect after he has invoked his right to counsel. This is clearly the law in Arizona. This Court has held that questioning a suspect after he has asserted his *Miranda* rights is permissible, so long as the suspect's right to cut off the questioning is "scrupulously honored." State v. McGinty, 120 Ariz. 162, 584 P.2d 1153 (1978); State v. Hatton, 116 Ariz. 142, 568 P.2d 1040 (1977).

Similarly, the Ninth Circuit Court of Appeals, in United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir. 1978) *cert. denied*, 436 U.S. 919 (1978), held that although questioning must stop after a right to counsel is asserted, it can later resume if the suspect makes a waiver of the right. Such a waiver of a previously asserted right must meet the definition pronounced in Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). That is to say, it must be an intentional relinquishment or abandonment of a known right or privilege. The *Rodriguez-Gastelum* opinion specifically concluded that a waiver could meet this test even if the questioning was resumed at the instigation of the police.

The facts of this case, however, do not meet the requirements of either the Ninth Circuit or Arizona case law. Edwards asserted that he wanted an attorney before making a deal. At this point all questioning ceased. The next morning, the detention officer told Edwards that detectives were there to see him. *Edwards told the officer that he did not wish to speak to anyone. The officer told him that he had to.*

Because Edwards was told that he had to talk to the detectives, I disagree with the majority's conclusion that his right to cut off the questioning was scrupulously honored. For the same reason his subsequent statements were not an intentional relinquishment or abandonment of his right to counsel, even though the detectives once again read him his *Miranda* rights. This is evidenced by the fact that when asked at the motion to suppress hearing why he

had not once again told these detectives that he wanted an attorney, he responded: "I didn't think you had to keep asking for an attorney over and over and over."

Moreover, I cannot condone the tactics of the investigating detectives. Despite the suspect's prior assertion of his right to counsel, detrectives questioned him the following morning, knowing that an attorney would not be appointed from him until the afternoon. I find the language of State v. Sauve, 112 Ariz. 576, 544 P.2d 1091 (1976) controlling on these facts.

> "After the defendant's refusal to answer questions, the officers ceased interrogation, but their *subsequent conduct and statements were made to persuade the defendant to reconsider his position.* Any response under such circumstances cannot be considered 'volunteered,' and the statements were not admissible." 112 Ariz. 576, 579, 544 P.2d 1091, 1094. (Emphasis added.)

Despite Arizona's rejection of a per se rule regarding the right to remain silent, a suspect's right to cut off questioning must be scrupulously honored, and his statements must be voluntarily made. Because he was told that he had to talk to the detectives and because the questioning took place shortly before an attorney was to be appointed, I would find the defendant's statements to be inadmissible.

FRANK X. GORDON, JR.
Justice

(Caption Omitted)

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[136] LARRY BUNTING,

was thereupon called as a witness in behalf of the Defendant Edwards, and, having been previously duly sworn, was examined and testified as follows:

THE COURT: Sgt. Bunting, you're still under oath and you're still under the Rule. We are hearing the Motion to Suppress with regards to Mr. Edwards' alleged statements.

DIRECT EXAMINATION

BY MR. BROGNA:

Q. Sergeant Bunting, do you recall on what date you arrested Robert Edwards?

A. The 19th of January '76.

Q. Do you recall what time?

A. Approximately four in the afternoon.

Q. Where did that take place?

A. I believe the street is Twenty-Seventh just east of Park.

Q. And who was present with you?

A. At the time of the arrest Detective Steve Bunting and a uniformed officer, Officer Allen, I believe.

Q. At the time he was arrested did you go over his Miranda rights with Mr. Edwards?

[137] A. Not at the moment of arrest.

Later at the police station.

Q. Did you take any statements or were any statements made to you at the time of arrest before the police station?

A. Define what you mean by statements.

Q. Did he say anything to you?

A. Just that he wasn't going and—he wasn't going with us.

Q. There was a scuffle and there was a hassle and then you finally securied him and he went with you; is that correct?

A. Yes.

Q. Did he make any statement to you relating to the LaConga Bar burglary-robbery-homicide?

A. Yes.

Q. During that period of time?

A. During that period of time. At the time of arrest, no.

Q. Did he make any statement to you about any offense during that period of time up to the station?

A. No.

Q. And where was he taken when he was taken to the Tucson Police Department?

A. To the Detective Division.

[138] Q. Where was he placed?

A. In the Captain's office.

Q. What captain?

A. I don't recall what captain we had at that time. It was just the only office available at that particular time.

Q. And was there someone in the office with him, did someone go in the office with—

A. Detective Steve Bunting and myself and Mr. Barefield.

Q. Where does the name Barefield come from, this name, as far as you know?

A. Well, I always thought his name was Barefield.

Q. You use it in your report; is that correct?

A. Correct. I wonder where Edwards comes from rather than Barefield. He has been arrested a number of times.

Q. Under the name of Barefield?

A. Barefield.

Q. Did an interrogation take place?

THE COURT: I'm ignoring that testimony.

MR. BROGNA: Excuse me?

THE COURT: I'll ignore the testimony that he has been arrested a number of times.

[139] MR. BROGNA: I don't want it stricken necessarily for this hearing.

THE COURT: All right. Go ahead.

Q. (By Mr. Brogna) Did an interrogation or attempted interrogation take place of Mr. Edwards in that captain's office?

A. Yes.

Q. Were his Miranda rights read to him at any time?

A. Yes.

Q. When?

A. By myself at the beginning of the interview.

Q. And how did you relate those rights to him?

A. By reading to him from the rights card. He acknowledged he understood his rights, waived his rights and stated that he was not involved, he had an alibi, and wanted to make a statement in that regard.

Q. And he gave you a statement?

A. Yes, he did.

Q. And it was recorded?

A. Yes.

Q. And do you have the recording with you?

A. No, I do not.

[140] Q. Do you have the tape recording available to you?

A. Yes.

Q. And that statement concerned an alibi.

A. Yes.

Q. For Mr. Edwards relating to his noninvolvement in the LaConga Bar robbery-burglary.

A. That's right.

Q. At anytime in the presence of the other officer or with you alone, was there some type of an attempted negotiation for a deal?

A. Yes.

Q. To the best of your recollection, Sergeant Bunting, what was that about?

A. As I recall Detective Hallums, who apparently

knew the defendant, talked to him shortly after we took the tape-recorded statement from him. And Hallums told me that he wanted ___

Q. Wait a minute. Were you present when Hallums talked to him?

A. No.

Q. Was Hallums present when the taped alibi statement was taken?

A. No.

Q. How long was it from the time he was arrested until the time he gave this taped quote [141] alibi unquote statement?

A. It was very shortly after we arrived at the police station.

Q. How did Detective Hallums get into the picture?

A. Hallums was in the office. Hallums worked another detail at the time and apparently knew the defendant.

Hallums talked to him for a short time and Hallums told me he wanted to talk to us again. That's when we went back in and he started talking about the deal.

Q. Did Hallums say he wanted to talk to the defendant?

A. Did Hallums say that?

Q. How did he get passed on to Hallums, is what I'm getting to, if you recall?

A. I don't really recall. We were just there and Steve and I came out and ___

Q. Steve who?

A. Steve Bunting. And I don't ___ I'm not really sure how Hallums come to talk—whether Barefield wanted to talk to him or Hallums requested to go and talk to him.

Q. So you don't know if Hallums approached Robert Edwards or Mr. Edwards approached him?

[142] A. I don't recall, no.

Q. But you did get the feeling from talking to Detective Hallums that Mr. Edwards wanted to talk further with you.

A. That's what Hallums said. "He wants to talk to you some more."

Q. Did he say he wants to make a deal with you?

A. No. No, not that I recall.

Q. How long was this statement that Mr. Edwards gave you?

A. I don't recall the number of pages.

Q. The taped statement.

A. The taped statement, I don't recall the number of pages.

Q. It was transcribed; is that correct?

A. Yes.

Q. I'll show you a document marked as Defendant's A for identification—C. Defendant Edwards' C for identification.

A. (Document handed to witness.)

Q. Do you recognize that document?

A. Yes, sir.

Q. What is it?

A. Transcription of the tape recording that was taken from Mr. Edwards. It's eight [143] pages long.

Q. Were you the questioning officer, the interrogating officer?

A. Yes. Yes, I was.

Q. This was his so-called alibi statement.

A. That's correct.

Q. To which you did not give much credence.

A. That's true.

Q. And which you so informed Mr. Edwards.

A. That is true.

THE COURT: The clerk is doing this the right way and

we have done this before. She's just marking ABC and you don't have to call it any particular defendant's exhibit.

Q. (By Mr. Brogna) Did you again go or have an opportunity to speak to Mr. Edwards after you spoke to Detective Hallums?

A. Yes, sir.

Q. Is Hallums a detective now?

A. No, sir.

Q. What's he doing?

A. He's a Field Sergeant now.

Q. When did you talk to Edwards and where the next time?

A. At the same office in the Detective Division, same evening. I don't recall the exact [144] time.

Q. Was it shortly after Hallums indicated that ___

A. Yes.

Q. ___ that Edwards wanted to speak further?

A. Yes.

Q. How long was he with Hallums?

A. I don't know.

Q. What did you do in the meantime?

A. I don't recall.

Q. What happened when you talked to ___ who was present when you talked to Mr. Edwards again?

A. Steve Bunting.

Q. During the next conversation Mr. Edwards requested an attorney before he would talk further; is that correct?

A. No.

Q. Before he would make a deal?

A. Before he would make a deal?

Q. Yes.

A. No. He was willing to make a deal if I would make a deal at that point. And it was ___ it was left that we would

wait—or he was going to wait until he had an attorney before he made the deal.

[145] Q. The deal being the consideration for a statement of implication, of self-implication, is that what you mean?

A. He never did tell me what he was going—going to say.

Q. So you weren't going to offer him anything.

A. I wasn't offering him anything at all except the opportunity to make his side of the story.

Q. Showing you Defendant's B for identification, a copy of your report, more specifically the second page thereof—is that your report, first of all?

A. Yes. Yes, it is.

Q. Is there not an indication that he wants to have an attorney?

A. An indication to have an attorney?

Q. Yes.

A. Yes, there is an indication that he wanted to have an attorney at a certain point.

Q. At what—

A. Would you like me to read—

Q. Without reading, if you can. From your own memory, if you can. If you can't, then you can read it.

[146] A. I don't—the question is what, sir?

Q. When did he want an attorney?

A. He never asked for an attorney. He stated he was going to wait until he had an attorney to make a deal. That was the only talk of an attorney with the exception he wanted—as a matter of fact, he insisted on talking with the prosecuting attorney and try making a deal.

Q. Before that?

A. During this—during this deal negotiation that he was trying to work out.

Q. He did in fact talk to a deputy county attorney.

A. Yes, he did.

Q. Randy Stevens?

A. Yes, he did.

Q. Chief Deputy County Attorney.

A. Yes.

Q. On the telephone?

A. Yes.

Q. In whose presence was Mr. Edwards at that point?

A. Detective Bunting and myself, Steve Bunting.

Q. Was that the time after he had spoken to Detective Hallums and you had again talked to him in the captain's office?

[147] A. Yes. This was after he spoke with Hallums.

Q. The negotiations for this deal at some point broke down.

A. That's true.

Q. And at some point Mr. Edwards indicated that he was not going to make any type of deal until he talked to his attorney first.

A. His attorney, or got an attorney, yes.

Q. All right. Now, what—what deal are you talking about or was he talking about?

A. I'm not—I'm not really sure because you've got to, if I can—

Q. Go ahead.

A. —picture the setting.

Q. Go ahead.

A. This was a situation where I had explained to Barefield the allegations that the other defendants had made concerning him, namely Soto and Kevin Reed.

And this was before the taking of the taped statement. The taped statement was taken and his alleged alibi was—was what was on the tape.

Then Hallums talked to him and then he wanted to talk more about what these people had said, so we went back over it again, about the allegations that Reed had made

and Boy (phonetic) Soto had made and then he explained that he had been around, he knows what's going on, and he wants to make a deal if it will help him.

[148] I explained to him that I'm not making a deal, I'm not offering a deal. If he has a side of the story to tell, that's what I'm willing to listen to.

Then he requests to talk to the prosecuting attorney. The prosecuting attorney at the time was Becker, who we couldn't get a hold of. He spoke to Stevens briefly.

At one point in all of this he was going to make a statement and then he changed his mind and it was just kind of a back and forth situation whether he was going to make a statement or not.

He was trying to get me to commit myself to a deal to him and I was not going to make him any deals.

That's where it eventually broke down and he said, "I'm just going to wait until I get an attorney to make a deal for me."

[149] Q. As far as you're concerned, Sergeant, when you say a deal, you meant that he confessed his complicity or be truthful about his complicity, if anything, in the LaConga incident in return for, say, a reduction of charges or something like that?

A. This is—this was my understanding of what the deal would have been.

Q. A deal means as far as getting what you want from the suspect, a deal means a statement in the broad sense, a confession more specifically.

A. I'm not sure I understand your statement.

Is that a statement or a question to me?

Q. It was a question. I'll repeat it, or rephrase it.

At that time deal to you meant a benefit from any deal or the deal to you would have been partly getting a statement from him.

A. Let me make it clear, I was not offering a deal. My purpose of interviewing him was to obtain a statement or an admission to be used in court.

Q. Against him?

[150] A. Against him.

Q. All right.

A. It was him, Mr. Barefield, that was wanting the deal that I was not going to commit myself to or the County Attorney's Office did not commit themselves to.

Q. Did the—when he did indicate that he was going to wait until he got an attorney before talking any more about a deal, did questioning continue after that point?

A. No.

Q. Had he been arraigned before a Magistrate up to that point?

A. No, he had not.

Q. All right. And did he, after mentioning that he was going to wait until he got an attorney, did he—before he talked further about a deal, is that the substance of what he said, is that a fair statement?

A. I think I should point out to you that it wasn't just this one time that he was talking about a deal.

It was, you know, it was kind of a back and forth situation where he was going to make a statement without a deal and then he decided he was going to wait and get an attorney [151] and get a deal and—but there was no questioning on our part as to his particular part in this.

I just pointed out to him, "The only thing I'm going to give you is the opportunity to make your side of the story known."

And he did make at least an initial side of the story known, or an alibi known.

Q. So you did have a statement which you obviously didn't believe. There was some discussion at least on his part about a deal talking with you and the county attorney. And then he was sent back to the Pima County Jail.

A. Not sent back. Sent to.

Q. Sent to the Pima County Jail.

A. Right.

Q. And his parting words were something to the effect that, "Wait until I get an attorney," or were there more words from his mouth at that time?

A. Oh, there were a lot of words from his mouth. I don't recall if those are the exact words.

When he left there my impression was that he was going to wait until he got an attorney, try to get the best deal he could for him.

[152] Q. But you had hopes that he might talk before that.

A. I always have hopes, Mr. Brogna.

Q. All right. But you did hear that he did mention that he was going to wait until he got an attorney.

A. Before making the deal?

Q. Before making the deal.

A. Yes. At that particular time that was —

Q. All right.

A. —his parting statement.

Q. Did you send Detective Marmion to the Pima County Jail the next morning to talk to Mr. Edwards?

A. No, I did not.

Q. Did he go on his own to your knowledge?

A. Yes.

Q. And —

A. And I was —

Q. Go ahead. I'm sorry.

A. I was pleasantly surprised when he come back and told me the news.

Q. Had you spoken to Detective Marmion?

A. I'm sure I had.

Q. About Mr. Edwards?

[153] A. About Mr. Edwards?

Q. Yes.

A. I don't—I can't say for sure. I would assume so.

Q. You would assume so. Was Detective Marmion in the police station when Mr. Edwards was being interrogated and the statement being taken, the taped statement?

A. I don't recall.

Q. But this was Marmion's case, was it not?

A. Yes. He was the lead detective on it, yes.

Q. And he was informed that he had given—that Mr. Edwards had given an alibi statement, was he not?

A. I don't have specific recall of it. Normally operating circumstances, he would have been informed, yes.

Q. Now, Mr. Williams was to be arraigned at—excuse me—Mr. Edwards was to be arraigned I guess, at one thirty or two o'clock. Was that in effect the initial arraignment?

A. Yes, I believe they were.

Q. Now, and before a public defender or an attorney was appointed.

To your knowledge is that when [154] attorneys are customarily appointed?

THE COURT: To the Court's knowledge it is, if you want that.

MR. BROGNA: I would ask the Court to take notice of the proceedings.

Q. (By Mr. Brogna) Detective Marmion, do you know what time he went over to speak to Mr. Edwards the following morning?

A. No, I don't.

Q. Do you know whether it was in the morning?

A. I believe it was, but I can't be certain.

Q. Do you know whether it was before arraignment and he had an attorney appointed?

A. Just from my knowledge of the way arraignments run and how the procedure is, I would say that would have been prior to an arraignment.

Q. Do you remember any specific conversation be-

tween Detective Marmion and yourself regarding defendant Edwards' case prior to Detective Marmion going over to the Pima County Jail the following day?

A. No, sir, I don't.

Q. Did Mr. Edwards request that you come yourself to the Pima County Jail or that Detective [155] Marmion be sent out there?

A. I have no knowledge of such a request.

Q. Your report does not indicate any such request for additional interrogation or talk of a deal; is that correct?

A. That is correct.

Q. Did you ever—you being the Sergeant of the Homicide Detail—did you ever direct any of your detectives not to bother Mr. Edwards any further?

A. No, sir, I didn't.

Q. Again referring specifically to your report, Defendant's B for identification, the second to the last paragraph where the attorney is mentioned, will you read that entire sentence into the record.

A. "At one point Barefield said he was going to make a statement and then changed his mind and stated that without a deal he was not going to make a statement. He would wait for his attorney to make a deal for him."

MR. BROGNA: I have no further questions.

THE COURT: Mr. Lingeman.

CROSS-EXAMINATION

[156] BY MR. LINGEMAN:

Q. Mr. Bunting, at anytime during the course of that conversation, and prior to this taped conversation, at anytime during this day that you made the arrest and that you have been testifying to, did Mr. Williams—excuse me—Mr. Edwards ever state to you at anytime that he didn't wish to talk to you without an attorney being present?

A. No, sir.

Q. Did he ever at anytime during this day that the arrest was made, during the day that you have been testifying about, did he indicate that he wished to have an attorney appointed for him?

A. No, sir.

Q. Is the only thing he ever said with reference to an attorney this statement you just read from your report and that he would wait and let an attorney make a deal for him?

Is that the only thing he ever said reference an attorney?

A. No. He said he wanted to talk to the prosecuting attorney.

Q. Reference any attorney other than the [157] prosecuting attorney, is this the only statement he had ever made about attorneys?

A. Correct.

Q. During your conversations with him was he cooperative to the extent that he was very talkative during the entire course of your inquiry about the LaConga Bar robbery?

A. Yes, he was.

Q. Did he ever at anytime indicate to you that he didn't wish to talk to you or didn't wish to make a statement prior to the statement you took, the taped statement, the alibi statement, I'll refer to it as.

A. No, sir.

Q. After the alibi statement was he still talkative with you?

A. Yes.

Q. And apparently at some point in time he indicated he wanted to make a deal.

Is that the first time he ever indicated to you that he wished to talk to you some more about the LaConga Bar robbery additionally to what he had said in the alibi statement?

A. Yes.

Q. For some period of time after this there was talk about a deal and you weren't giving him [158] any deal and he wanted to talk to the county attorney and he did talk to the county attorney; is that correct?

A. Correct.

Q. And during all of this time he continued to talk to you and never requested an attorney or never requested that he shouldn't be talked to or never in any way indicated that he didn't want to talk to you; is that correct?

A. That is correct.

Q. Did Mr. Edwards seem to understand your questions and were his answers appropriate to his questions?

A. Oh, yes.

Q. Did you have any problem communicating with him in a rational manner?

A. No, sir.

Q. And you had advised him of his constitutional rights off a rights card; is that correct?

A. Twice he was advised.

Q. Could you go ahead and advise us the way you advised him.

A. Which time?

Q. Either time, if it was the same. If it was different, let me know.

[159] A. Prior to the interview after arrest, he was read from the rights card and then his rights were read to him again and placed on tape and he was advised to the following.

"You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have an attorney to be with your prior to questioning and during questioning if you so desire. If you can't afford an attorney, you have the right to have an attorney appointed for you prior to questioning."

He was asked if he understood these rights. He said he did.

"Now, having been advised of these rights and understanding these rights, will you answer my questions?" Which he did.

Q. When you finally terminated the discussion of a deal and the negotiations, or whatever was going on that day, did Mr. Edwards tell you, "I'm not going to talk to you any more and I don't want to talk to the police any more until I see a lawyer"?

A. No, sir.

Q. Did he ever indicate to you that he would not talk to you any longer perhaps by [160] saying, "I don't want to talk to you any more about this case," or, "I don't want to talk to any police officers"?

Either an express statement or an implied statement.

A. No, sir.

MR. LINGEMAN: That's all the questions I have.

REDIRECT EXAMINATION

BY MR. BROGNA:

Q. The sentence that you read from your report, he uses the word—he uses the term State in the same sense that he uses the word deal and attorney and you did not conceive of that as meaning—you conceived of these as between two different things, a statement and a deal.

MR. LINGEMAN: I think that's an improper question. It's Detective Bunting's statement that's contained in there.

THE COURT: Overruled. That's what I understand he is asking.

THE WITNESS: The statement that's in the report is the way I dictated the report to refresh my memory concerning the circumstances [161] how it occurred at that time.

I'm not saying that this was his exact words. This was the meaning that I attached to it.

Q. (By Mr. Brogna) That without a deal he was not

going to make a statement and he would wait for his attorney to make a deal.

Those are your words, Sergeant, in the report.

A. Perhaps it—

MR. LINGEMAN: Your Honor, I am going to object until there is a question before the witness.

THE COURT: Sustained.

Q. (By Mr. Brogna) Are those your words?

A. These are my words, yes.

MR. BROGNA: No further questions.

MR. LINGEMAN: I have nothing further.

THE COURT: You may step down.

MR. LINGEMAN: May this witness be excused at least for today?

THE COURT: Yes. You are excused.

MR. BROGNA: Subject to recall.

THE COURT: Yes. Everyone has to remain available in this case.

MR. BROGNA: I call Mr. Edwards to the [162] stand.

ROBERT EDWARDS,

the defendant herein, is thereupon called as a witness in his own behalf, and being first duly sworn, was examined and testified as follows:

THE COURT: Good afternoon, Mr. Edwards.

THE WITNESS: Good afternoon, sir.

THE COURT: Proceed.

DIRECT EXAMINATION

BY MR. BROGNA:

Q. Would you state your name for the record.

A. Robert Edwards.

Q. Were you present when Detective Sergeant Bunting just testified?

A. Yes, I was.

Q. Did you in fact give a taped statement to Detective Sergeant Bunting at the Tucson Police Department on January 19, 1976?

A. Yes, I did.

Q. The day you were arrested?

[163] A. Yes, sir.

Q. Do you recall what, if anything, you said to Sergeant Bunting about making a further statement?

A. No, I didn't.

Q. I said what if anything do you recall, do you remember saying anything about another statement?

A. No.

Q. Did you give another statement—

A. No.

Q. —to the police.

Did—did an officer at any other time attempt after that, after Sergeant Bunting talked to you, did any other officer attempt to get another statement from you?

A. Sergeant—Detective Marmion.

Q. And when did that take place?

A. That took place the next morning about eight o'clock or nine somewhere.

Q. Did you ask—

THE COURT: Where did this take place?

THE WITNESS: This took place at the County Jail.

Q. (By Mr. Brogna) And did he come over at your request?

[164] A. No, I didn't request to see nobody.

Q. Did you ask to see Detective Marmion?

A. No, I didn't ask to see him.

Q. Had you been arraigned in court yet?

A. No, I wasn't.

MR. BROGNA: No further questions of Mr. Edwards at this time.

THE COURT: Mr. Lingeman.

CROSS/EXAMINATION

BY MR. LINGEMAN:

Q. Did you give a truthful statement to Detective Marmion that day?

A. No.

Q. What did you do?

A. Detective Marmion came down and asked me to make a statement and I already told him I had made a statement I wasn't involved in nothing.

And he told me that—that he was going to catch Willie Williams and he was going to make a statement and there was a couple of more had made statements against me.

Q. I guess there was another detective with Detective Marmion.

A. I think Detective Hallums.

Q. You told those gentlemen you didn't [165] want to talk anymore and you didn't give them another statement.

A. They got another statement.

Q. From you?

A. I don't know how they got it, but—

Q. Maybe I confused you.

A. Repeat the question again.

Q. Sure, Mr. Edwards.

The next day when Detective Marmion and the other detective came to talk to you, this was the day after you were arrested, I guess you're saying you didn't give them another statement, they asked you for one and you said you didn't have anything to say, you weren't involved; is that right?

A. They said more than that.

Q. Did you give them a statement about your involvement?

A. I don't understand what you're talking about.

Q. Did you tell them at that time, the day after your arrest, did you tell Detective Marmion and the other detective about your involvement in the LaConga Bar—

A. No, I didn't.

Q. There was no statement. They tried to [166] get one and you told them you didn't have anything more to say about it; is that right?

A. I told them I didn't have anything more to say about it and they left and they said they was going to pay me back.

MR. LINGEMAN: Okay. That's all I have.

THE COURT: You may step down.

THE WITNESS: Yes.

(Witness leaves stand.)

MR. BROGNA: Call Detective Marmion.

THE COURT: Before we call the witness, Mr. Noe, you are here and have you got anything to take up with the Court?

MR. NOE: Nothing at this stage, Your Honor.

THE COURT: Thank you.

MR. BROGNA: Detective Marmion, please.

[167] VICTOR Z. MARMION,

was thereupon called as a witness in behalf of the defendant, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROGNA:

Q. Would you state your name, please.

A. Victor Z. Marmion.

Q. Did you obtain a statement from Robert Edwards on January 20th of 1976?

A. A verbal statement, yes, sir.

Q. Where was this statement obtained?

A. Pima County Jail.

Q. Who was with you?

A. Detective Milne.

Q. What time was it?

A. When I first—when we first contacted Mr. Barefield it was approximately 9:15 a.m.

Q. Did Sergeant Bunting dispatch you to the jail?

A. No, sir. I went there of my own accord.

Q. Did you know he had given a statement the day before that to Sergeant Bunting that was on tape?

[168] A. I knew Sergeant Bunting had spoken with Mr. Barefield. I knew the very basic facts surrounding his statement as far as an alibi and that he was denying being involved in this incident.

Q. Did Sergeant Bunting tell you that Mr. Barefield, as you call him, wanted to see or talk to an attorney before he made any quote deal unquote?

A. No, I don't recall Bunting telling me such a thing.

Q. Were you the—were you aware before going out to the jail that Mr. Edwards at one point the day before mentioned an attorney?

A. No. When I went out to the County Jail I wasn't really that concerned with what he had said the day before. I went out there of my own accord to see what he was going to tell me that particular day.

Q. You weren't concerned that he had said anything about an attorney or a deal?

MR. LINGEMAN: Your Honor, I'm going to object. Asked and answered.

The detective has indicated what he knew and didn't know already, specifically about those two facts.

[169] THE COURT: Overruled. You may answer. Do you remember the question?

THE WITNESS: No, sir.

THE COURT: The question was you weren't concerned about an attorney or a deal.

THE WITNESS: No, sir, not at that time. I just went out on my own.

Q. (By Mr. Brogna) Went out before arraignments?

A. Well, if it was about nine fifteen in the morning I would have to say yes.

Q. It isn't your practice to go out after they have been appointed attorneys?

MR. LINGEMAN: I object. That's irrelevant what their practice is.

The question is in this case about did he go out before or after.

THE COURT: Sustained as to the form of that question. You may inquire further.

Q. (By Mr. Brogna) Were you aware that Mr. Edwards was not arraigned or brought before a Magistrate for an initial appearance at the time you went out?

A. I was aware of it sometime that morning while I was talking, but I don't remember what stage he told me that he didn't have an [170] attorney, but he did mention it to me.

Q. You knew what—what time people were brought before a Magistrate, did you not?

A. I do. Usually about one thirty, two o'clock.

Q. So you were—you were sure he didn't have an attorney yet appointed.

A. As I have stated, I didn't give it any thought until I got up there and had some conversation with Mr. Barefield and Mr. Barefield indicated to me he didn't have an attorney.

I had one thing on my mind, to go out there and question him about his murder and see what he was going to say.

Q. He didn't want to—he didn't want to talk to you or have you put anything on tape, did he?

A. He wanted to talk to me.

Q. He didn't want you to put anything on tape, did he?

A. He didn't want to give me a tape-recorded statement. That is correct.

Q. Did he tell you why he didn't want you to tape a statement?

A. He said he just didn't want it on tape.

Q. He did not relate that he said he [171] didn't want to put it on tape because he knew it could be used against him, it could be incriminating to him?

A. If I can backtrack, I think I can explain this.

Q. I want you to ask (sic) that question.

MR. LINGEMAN: I think he has a right to explain his answer if he needs to.

THE COURT: You have to answer the question, but you may explain your answer if necessary.

THE WITNESS: Repeat the question.

Q. (By Mr. Brogna) I don't remember the question.

THE COURT: Do you want the reporter to read it?

MR. BROGNA: Please.

(Whereupon, the reporter read the last question.)

Q. THE WITNESS: He said he didn't want it to be on tape. I made the reply, "What's the big deal? There are two of us here. We can both testify to it if you talk to us."

He said, "I don't want it on tape."

This is approximately—I had played eight or no more than nine minutes of Manny Soto's statement.

[172] Q. (By Mr. Brogna) Let me show you Defendant's A for identification purposes, which purports to be a copy of your report.

Would you personally identify if it is?

A. Yes, that appears to be a copy of my supplement.

Q. There is a portion of your report relating to your

interrogation of Mr. Edwards at the Pima County Jail on January 20th, 1976.

Could you find that?

A. Yes. It starts on Page approximately 6 and continues on to Page 7.

Q. There is a portion of that—more particularly that in which you describe the reasons for Mr. Edwards not having you record any statements, is there not?

A. That's correct. He indicated they would be used against him in a court at a later time. He would tell us anything we wanted to know.

Q. But not—but not have it taped; is that correct?

A. That's what he said.

Q. Because he was afraid that that could be used against him in a court of law.

[173] A. Well, he told me that it would be used against him in a court later. Whether or not he was afraid I can't answer that. I can't answer what was going through the man's mind.

As I have stated, he said he did not want to give us one because it would be used against him later on.

I said, "Big deal. There are two of us. We can testify about it."

He said, "No, I don't want to give one."

Q. Are you saying, Detective Marmion, that he—he didn't want to give you a tape—he told you he didn't want to give you a tape recording because he knew it could be used in a court of law, but he decided that he was going to give you an oral statement because he knew very well that that could be used in a court of law?

A. What I'm saying, the man decided that he didn't want to give me a taped statement and he said he was going to give us an oral report. What reasons he had I don't know.

Q. You weren't fast-talking him with a tape recorder?

A. I didn't have a tape recorder.

Q. You had a tape recorder in there with [174] you.

A. I had it in there with me, correct, but I didn't have it on.

Q. Why was—who brought up the tape recorder first of all?

A. Barefield.

Q. And in what context did he bring up the tape recorder?

A. He said he would talk to us, but first he wanted to hear part of Manny Soto's statement.

Q. Did you play part of Boy Soto's statement?

A. I did.

Q. Did any—did that tape recorder come up again reference a statement by Mr. Edwards?

A. I don't quite understand the question.

A. Did Mr. Edwards in reference to something he was going to say, mention a tape recorder, that he didn't want it or he did want it or he didn't care if it was there?

A. As I stated, I asked him if I could record his statement and he said no. That's the only time I recall him bringing it up again.

Q. Did he give you a reason why he didn't want it recorded?

A. Yes. He said he didn't want it used [175] against him in court later on.

THE COURT: I think we are going to have to stop, Mr. Brogna, at this point. Is that satisfactory with you?

MR. BROGNA: Yes, sir.

THE COURT: We'll stand at recess until one thirty Monday afternoon with this witness on the stand and we'll complete the motion before we go back into the other one.

MR. LINGEMAN: Judge, it occurs to me that if we have to leave to go out of town on the matter that we have—

THE COURT: Somebody let me know and we'll get some other work.

(Whereupon, the evening recess was had.)

(CAPTION OMITTED)

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[9] VICTOR Z. MARMION,

thereupon resumed the stand as a witness in behalf of the Defendant Edwards, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (continued)

BY MR. BROGNA:

Q. When you saw Mr. Edwards at the Pima County Jail on January 20th, 1976, did you take some tapes with you?

A. Yes, sir, I did.

Q. Any particular person's tape?

A. I had Manny Soto's tape with me.

Q. Prior to going to the Pima County Jail and seeing Mr. Edwards, did you have knowledge that he requested to hear Soto's statement?

A. No, sir.

Q. Did you bring the tape at your own initiative?

A. Yes. I was carrying it with me.

Q. Did you—when you walked in or when you first started talking to Mr. Edwards, did you suggest that he should listen to Soto's conversation?

A. No, sir. It was played for Mr. Barefield [10] at his request.

Q. What did he do, ask you, "What's that you've got with you?"

A. No. He had knowledge that we had a statement from the other suspect Soto, and—

Q. You had a confession from Soto?

A. That's correct.

Q. And how did he get knowledge of that?

A. Oh, I don't—I can assume, but I'm not positive because I wasn't present at the time.

Q. You didn't tell him?

A. No.

Q. When you walked in was Detective Milne with you?

A. Yes, sir.

Q. When you walked into the jail where did this conversation take place?

A. In one of the attorneys' booths.

Q. You walked over there with the tape of Mr. Soto and a blank tape, I take it?

A. I remember having the whole file with me. I had the tape recorder and some tapes. I don't recall exactly how many.

Q. Do you remember how the conversation in that room was initiated or who initiated the conversation?

[11] A. Yes, sir.

Q. Go ahead.

A. From the beginning?

Q. Yes.

A. I got there. I identified myself to Mr. Barefield as a homicide detective.

He said something to the effect, I don't remember his exact words, that he recognized me from seeing me the night before at the Detective Division.

I told him I was the detective that had the case and I wanted to talk to him.

I then advised him of his constitutional rights. He replied that he would talk to me and tell us anything he wanted to know, but, first, he wanted to hear Manny Soto's statement.

I played—proceeded to play Soto's statement.

I played approximately nine, no more than 12 minutes, of the statement to him.

Q. All right.

A. Then I stopped. I stopped the tape and asked him if he would give us a statement.

Q. What did he say?

A. He said because he didn't want it used [12] against him in court.

MR. BROGNA: I have no further questions.

THE WITNESS: He didn't—

THE COURT: Just a minute. Just a minute. Have you finished answering Mr. Brogna's question?

THE WITNESS: No. I was going to clarify that it was the taped statement that he didn't want to be used in court.

THE COURT: Do you want to examine further?

MR. BROGNA: Yes, please, Your Honor.

Q. (By Mr. Brogna) He said he didn't want to give you a taped statement because it could be used in court?

A. Yes, sir. And then I proceeded to say something else.

Q. What did you say?

A. I said if you are going to give us a verbal statement, oral statement, big deal. Milne and I can testify. We would rather have it in your words.

He said, "I just don't want to give a taped statement."

Q. Because it could be used in court.

[13] A. Yes, sir.

Q. He feared this.

A. The tape statement. He didn't appear to fear the verbal or oral statement.

Q. Did you take notes with which to draft this oral statement in your notes?

A. No, sir. When Milne and I were on the car outside

right after leaving I put this on the tape recorder. Later I listened to my tape recording and wrote it out on my work pad.

Q. Is that tape still available?

A. No, sir.

Q. Do you recall what time this conversation was finished or concluded?

A. To the best of my recollection it was about nine fifteen when we contacted him in the morning and we left the County Jail about approximately ten forty, so I would say approximately ten thirty.

MR. BROGNA: I have no further questions so far.

THE COURT: Mr. Lingeman.

CROSS-EXAMINATION

BY MR. LINGEMAN:

Q. When you learned that Mr. Edwards was [14] reluctant to give you a taped statement, did you take pains to tell him that the—even though it wasn't taped, that it—

THE COURT: Sustained as leading. Mr. Brogna indicated he was going to object and I agree.

Q. (By Mr. Lingeman) What did you do to make it clear to Mr. Edwards, if anything, reference what use could be made of this statement?

A. I told him that the verbal statement would be used against him and I did this for two reasons.

At the time there was two things going through my mind.

Q. What were those two things?

A. The first reason was that I wanted to be sure he understood what was going on, that he voluntarily waived his right, that he understood it would be used against him.

And the second reason was I knew if he didn't understand, that it would be inadmissible in court.

Q. Detective Milne was there when this exchange and conversation and clarification took place?

A. Yes, he was.

[15] MR. LINGEMAN: That's all I have.

MR. BROGNA: I have nothing further.

THE COURT: You may step down.

(Witness leaves stand.)

MR. BROGNA: I forgot who was putting on the proof.

THE COURT: Mr. Lingeman.

MR. LINGEMAN: Detective Milne. If Sgt. Hallums is out there, I will take him because I think he will be shorter.

THE COURT: I said Mr. Lingeman was putting on the proof. We had Mr. Edwards and then my notes show that we had Detective Marmion and I don't see that I show you had finished.

I guess to correct the record you are still proceeding on the motion.

MR. BROGNA: I would call Detective Hallums if he is available now.

[16] PAUL HALLUMS,

was thereupon called as a witness in behalf of the defendant Edwards, and being first duly sworn, was examined and testified as follows:

THE COURT: The witnesses in this case are under the Rule. You can't be in the courtroom at anytime except when you're testifying. You are not to discuss your testimony with anyone except the attorneys until I have finished hearing this motion. Thank you.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. BROGNA:

Q. Would you state your name, please.

A. Paul Hallums.

Q. And your current occupation?

A. Sergeant, Tucson Police Department.

Q. Calling your attention to last—well, January 19th of 1976, what division were you working with then?

A. As a Detective in the Armed Robbery Detail.

Q. On January 19, 1976, did you have occasion to interrogate or attempt to interrogate [17] Mr. Robert Edwards?

A. Yes.

Q. Where did this take place?

A. At the Tucson Police Department.

Q. And how did this take place?

A. He was already there. He had been talking to some other detectives.

I had a case that I wanted to talk to him about and went in and talked to him about that case.

Q. Did he see you, did Mr. Edwards see you and come over and talk to you, Sergeant?

A. No. He was in an office at the Detective Division.

Q. Just how did he get into your office or how did you get to talk to him, if you remember specifically?

A. He had been brought there by some other detectives and was in custody.

Q. And you saw him and wanted to speak to him.

A. That's right.

Q. How did that conversation start?

A. I had a—

Q. Without going into what you were investigating, how did the conversation start?

[18] A. I introduced myself and advised him of my function and told him I wanted to talk to him.

Q. All right. Did you ask him if he wanted to talk to you?

A. No. I told him what I wanted to talk to him about.

Q. And you started asking him questions about armed robberies?

A. That's right.

Q. Or an armed robbery.

Did there ever come a time when he told you he didn't want to talk any more or didn't want to talk?

A. No.

Q. How did the conversation terminate?

A. I asked him if he would like to speak to Sgt. Bunting again. He stated he would and he did and I left.

Q. Without you asking him, did he tell you he wanted—did he come out and on his own say he wanted to speak to Bunting again?

A. No.

MR. BROGNA: I have no further questions.

CROSS-EXAMINATION

BY MR. LINGEMAN:

[19] Q. This other robbery case was not the LaConga robbery.

A. No.

Q. It was something unrelated to this murder case.

A. That's right.

Q. Did he indicate he wanted an attorney or didn't want to talk to you or didn't wish to talk to anybody?

A. No.

MR. LINGEMAN: That's all I have.

REDIRECT EXAMINATION

BY MR. BROGNA:

Q. How long did this conversation take place?

A. Between five and ten minutes.

Q. Did it take place in the same room that Sgt. Bunting was talking with him in?

A. Yes.

Q. Did Sgt. Bunting leave the room while you commenced to speak?

A. Yes.

Q. When you left the room, did Sgt. Bunting go back?

A. Yes.

[20] Q. And continue to talk to Mr. Edwards?

A. He went back in the room.

Q. Were there any other detectives down there at the time talking to Mr. Edwards?

A. Sgt. Steve—excuse me—Detective Steve Bunting.

Q. Was he in with him alone or someone else?

A. When I left he went back in with Sgt. Bunting.

MR. BROGNA: I have no further questions.

THE COURT: You may be excused.

THE WITNESS: Thank you.

(Witness excused.)

MR. BROGNA: Detective Milne, please.

MR. LINGEMAN: May this witness be excused?

THE COURT: I did excuse him.

[21] CHARLES MILNE,

was thereupon called as a witness in behalf of the Defendant Edwards, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROGNA:

Q. Would you state your name, please.

A. Charles Milne.

Q. Your occupation?

A. Detective, Tucson Police Department.

Q. Were you so employed on January 19, 1976?

A. Yes.

Q. On that date what particular detail were you working?

A. Homicide.

Q. Did you have occasion to investigate the LaConga robbery and homicide?

A. I had occasion to assist in that investigation, yes.

Q. Okay. On January 19, 1976, did you talk to any of the alleged defendants in the case—well, specifically, did you talk to Mr. Robert Edwards?

A. It was either on the 19th or the 20th, [22] I'm not sure which date it was.

Q. Did you ever talk to him at the police station?

A. No, sir, I did not.

Q. Did you ever see anyone talk to him at the police station?

A. He was with other people, but as far as an interview being conducted of Mr. Barefield, no, I did not.

Q. Who was he with?

A. He was in the same general area of Sgt. Bunting and Detective Marmion and myself and I believe Detective Steve Bunting.

Q. When did you talk to Mr. Edwards?

A. I believe it was the following day.

Q. Where did you talk to him?

A. At the Pima County Jail.

Q. That would be January 20th, 1976?

A. Yes.

Q. What time did you speak to him?

A. I think it was approximately nine fifteen in the morning

Q. By whom were you dispatched to the Pima County Jail to speak to Mr. Edwards?

A. I accompanied Detective Marmion.

Q. How is it that you decided to go to [23] the Pima County Jail and talk to Robert Edwards?

A. It was Detective Marmion who apparently wanted to talk to him about the case under investigation.

I was asked to accompany him and—

Q. By whom?

A. By himself.

Q. You knew that Robert Edwards was interrogated the day you had seen him down at the station?

A. I had no personal knowledge of that other than what I was told that somebody had talked to him, yes.

Q. Sgt. Bunting told you, did he not, that he tried to get a statement from Edwards?

A. I don't believe he told me anything directly. It was in conversation that it was overheard.

Q. With other detectives of the Homicide Detail?

A. Yes.

Q. That Mr. Edwards had given some type of a baloney alibi statement; is that correct?

A. I don't recall him specifically making that statement.

Q. Well, what—

[24] A. I don't recall what the context of the statement was.

Q. What do you remember specifically hearing about Mr. Edwards' conversation with the police on the 19th?

A. It would be a basic thing on my part. I assumed he didn't want to give a statement at that time.

Q. That's right. He was holding out.

A. Well, I don't know if those were the exact words.

MR. LINGEMAN: I object to him asking the witness to speculate since the witness already testified that he wasn't present and didn't hear what happened that first day.

THE COURT: The present record may stand. Proceed.

Q. (By Mr. Brogna) I don't know if I asked you what time did you go the the Pima County Jail.

A. Approximately nine fifteen on the following morning of January 20th.

Q. Where did you specifically go in the jail, did you talk to Mr. Edwards?

A. It was in one of the old attorney's booths.

[25] Q. Is there any reason you went out to the jail in the morning rather than the afternoon of the 20th?

A. No, other than that was the time Detective Marmion wanted to go out and talk to him.

Q. No particular hurry to see him, say, before initial appearances?

MR. LINGEMAN: Objection.

THE COURT: Overruled.

THE WITNESS: That—not that I know of. Not to my knowledge, no.

Q. (By Mr. Brogna) What did you or Detective Marmion, that you saw, take into the attorney's booth or the room with you at the jail?

A. To my recollection I don't think anything was taken into the booth.

Q. Was there a tape recorder? Let me ask you that, did somebody have a tape recorder?

A. I can't swear to it. I would have to look at the reports. If it's in the reports, that's how it would refresh my memory. I just—

Q. All right.

A. —don't remember.

Q. Let me show you Defendant's A for identification and see if you recognize that.

[26] A. This is a supplement that I made dated the 22nd of January.

Q. Is that supplement relating to the LaConga investigation and the part you took?

A. Yes.

Q. Is that the only report you made?

A. This is the only report, yes, sir.

Q. Is there any mention at all about your accompany-

ing Detective Marmion to the jail for a statement from Mr. Edwards?

A. No, sir. My involvement with Detective Marmion concerning Mr. Barefield was documented by a supplement that he made.

Q. Let me ask you then if you can remember, without a report, do you recall Mr.—as you call him—Barefield that day having any reluctance, showing any reluctance, to give a statement to Detective Marmion and yourself?

A. On January 20th?

Q. At the jail, yes.

A. No, sir.

Q. Do you recall the playing of a taped statement of Boyd Soto or Boy Soto for Mr. Edwards to kind of prime him?

A. There was a tape played, one from Mr. Williams that I know, and it's possible it was [27] played for Mr. Barefield, but, again, I would have to refresh my memory by reading the report or glancing at the report.

Q. Do you remember obtaining a statement from Mr. Edwards that day?

A. Yes.

Q. Do you remember whether it was a taped statement or just an oral statement?

A. It was an oral statement.

Q. That wasn't taped?

A. Yes.

Q. Do you remember any discussion of taping the statement or not taping it?

A. Mr. Barefield was asked if he would supply Detective Marmion with a taped statement.

He had indicated that he would talk to us, but he did not want the information documented on tape.

He was advised that being that we were both there we could both testify to in court anything he did say verbally, whether it was on tape or not.

And he again reiterated that he would talk to us, but he didn't want his voice down on tape.

Q. Did he tell you why he didn't want it [28] down on tape?

A. He indicated that he did not want the tape used against him in court.

As I said, we advised him that any statements he made to us, whether they were on tape or not, could be used against him in court.

Q. Is there any reason why two rather than one detective went to the Pima County Jail to talk to Mr. Edwards?

A. Well, I wasn't going to the jail for the purpose of talking to Mr. Edwards. I was going to the jail for the purpose of just being a witness to any statements that he made.

Q. The expressed purpose then at least as far as you knew of going to the jail that day was to obtain a statement.

A. Was to interview Mr. Barefield with the obvious—obtaining the statement would be obvious.

MR. BROGNA: I have no further questions.

THE COURT: Mr. Lingeman.

CROSS-EXAMINATION

BY MR. LINGEMAN:

Q. You indicated just now that Mr. Edwards [29] did not want the tape used against him in court. And I think you indicated that there was some explanation after he said that about what could be and what could not be used in court; is that right?

A. That's right.

Q. Did you and Detective Marmion, either one of or you, or you talking to him separately, make it clear to Mr. Edwards that anything he said could be used against him even though it was not put on tape?

A. Yes, sir. Detective Marmion explained that to him rather thoroughly.

Q. Did he indicate to you and to Detective Marmion that he understood that, but he still did not want his words down on tape?

A. Yes, sir.

MR. LINGEMAN: That's all I have.

THE COURT: Mr. Brogna.

MR. BROGNA: That's all. Thank you.

THE COURT: You may be excused. Thank you.

(Witness excused.)

MR. BROGNA: May it please the court, I initially put Mr. Edwards on for one or two questions. I would like to put him back on and [30] question him on further direct examination.

THE COURT: You may.

ROBERT EDWARDS,

the defendant herein, was thereupon recalled as a witness in his own behalf, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROGNA:

Q. Do you recall being arrested on January 19, 1976?

A. Yes.

Q. At what time approximately did that take place?

A. Oh, about four thirty.

Q. When, in the morning, afternoon or what?

A. In the evening.

Q. And who arrested you, do you remember?

A. I think the two Buntings. I think Sgt. Bunting and his son.

Q. Sgt. Bunting and Steve Bunting?

A. Right.

[31] Q. Where did this take place?

A. On 1022 East Twenty-First Street on the south side.

Q. And how did the arrest take place?

A. Well, I was with my—I was with my fiancee and with my kids and a police—the Buntings knocked on my door. They was looking for my house.

They seen a black Cadillac outside and they was looking for the house that the black—of the person who owned the black Cadillac.

So they knocked on my door and they asked me—they asked me was my name Robert Edwards. I told him yes, my name was Robert Edwards.

He said, "We have a warrant for your arrest for first degree murder and armed robbery."

Q. And then what happened?

A. So I stepped outside and they start—I asked them what are they talking about.

So one grabbed me on the arm and was trying to jerk my arm up and slam me against the building.

Then they—I told them to stop [32] hitting me and slamming me on the back and they had their guns pulled out.

Then my kids came around and they had their guns pulled out. So I made it away from the scene so they couldn't shoot my kids.

Q. Were you eventually secured or arrested?

A. Right.

Q. Were you put in a police car?

A. Yes, sir.

Q. Did they attempt to talk to you right outside your place there?

A. No, they didn't.

Q. At any time did Sgt. Bunting or Steve Bunting, the other detective, read you your Miranda rights?

A. No. It was a detective—it was a black policeman in a car. I don't know his name.

He just handcuffed me and put a gun in my head and put me in the car.

Q. Where did they take you?

A. To the precinct.

Q. Where did they take you in the police station?

A. Upstairs somewhere. I don't know where. I was on a high floor.

Q. Did they talk to you up there?

[33] A. Yes.

Q. Who talked to you?

A. I remember it was Sgt. Bunting.

Q. Prior to talking to you, did he read you your Miranda rights somewhere along the line?

A. He—oh, yes. He said, "You have a right to be—remain silent and anything you say can be used against you in a court of law."

Q. Did you understand what he read to you?

A. Yes. Yes, I did.

Q. Okay. Did you proceed at that time to talk to him?

A. I told him that I didn't have nothing to say to him.

Q. Then what happened?

A. Then I—I told him I wanted a lawyer.

Q. When did you tell him you wanted a lawyer?

A. When I was in there and he asked me about a murder. He had a confession from Calvin Reed and he had a confession from Soto and he wanted me to talk.

I told him, "I don't know what you're talking about." I said, "Well, I need a lawyer."

He said, "All we want is your side [34] of the story."

I said, "I don't have nothing to hide and I'll tell you my side of the story."

Q. You gave him a statement.

A. Yes, I did.

Q. Was that statement recorded?

A. Yes, it was.

Q. How long did that all take, if you know?

A. I think it was about a hour forty-five minutes or a hour.

Q. Do you remember who was present when that statement was taken?

A. It was Bunting.

Q. Who, Sergeant or the other one?

A. The sergeant. I remember him. But it was fade (sic) in my mind about the other Bunting. There was so many police coming back and forth questioning, I don't remember.

Q. You mean there was more than Bunting?

A. Right. There was another came in. It might have been his son. And another came in. It was back and forth. I don't really remember it's been so long.

Q. What happened after you gave the taped statement?

A. Well, he asked me, he said, "Is this [35] your side of the story?"

I said, "Yeah, this is my side of the story."

He said, well, he know—he said that he know that Soto confess, you know. Calvin Reed confessed.

And he said he was going to catch Willie Williams and Willie Williams was going to confess.

Q. Who told you this?

A. Bunting.

Q. Sgt. Bunting?

A. Right.

Q. He wasn't satisfied with your statement?

A. No. He said that—that he knew that I was lying, you know.

Q. Oh.

A. Right.

Q. And anytime—what happened after that, after you

gave the statement and he told you that he wasn't satisfied?

A. I told him that I really didn't have nothing to say, I wasn't involved in nothing. I didn't really have nothing to say to him.

But that didn't stop him. I say—I asked him about a attorney. He said, "You [36] want to call a attorney?"

I said, "Yes, I want to call a attorney."

He said, "I have a attorney you want to call."

Then he rang the number for the attorney and I looked at it and it was the district attorney and—

Q. Did you end up talking to a district attorney that night?

A. Right.

Q. Do you know who?

A. I don't know who it was. Just at the other end of the line it was a district attorney.

Q. Was that Randy Stevens?

A. I don't know. I found out later on it was Randy Stevens.

Q. What did you talk to the district attorney about?

A. He called and I said, "Who is this?"

He said, "This is the district attorney."

I said, "I don't have nothing to say to you," and I hung up. It was about three or four seconds.

Q. Was there talk about a deal?

[37] A. I don't remember no deal. The deal Bunting was asking me about, a deal—

Q. That's what I'm getting at.

Q. That's right.

Q. What do you remember was the talk about the deal no matter who said it?

A. The deal was the confession.

Q. They wanted a confession from you?

A. Right.

Q. What were you supposed to get?

A. I was supposed to get a deal to make any sentence more low and testify.

Q. Did you talk—did Sgt. Bunting talk to you about that?

A. Right.

Q. And what happened, was a deal—did you strike a deal, did you make a deal.

A. I didn't want to make no deal. I said, you know, well, I had to talk to my lawyer. I wanted a attorney.

Q. Did you specifically ask for a lawyer before you made a deal?

A. That's right. I asked for a attorney.

Q. Do you remember talking to this other officer, Detective Hallums?

A. Yes, I did.

[38] Q. Now, he's a police sergeant.

A. Yes, I did.

Q. Did you ask to speak to him?

A. No, I didn't.

Q. How did it happen that you ended up talking to him that day?

A. I was sitting in a room. No, I was coming—they had arrested me.

I see "Oh, say, oh, there go Barefield," when I was in the police station. He says, "There go Barefield."

I said, "Yeah."

They brought me in and my clothes was all dirty. They put me in a room and then started 'gating me' and after that Bunting went out and Hallums came in and set down and he asked me about a robbery.

Q. Did you ask Hallums to come in and talk to you?

A. No, I didn't.

Q. Did he read your rights to you?

A. He didn't read nothing to me. He just started talking to me with a robbery.

Q. Did you talk to Hallums?

A. I told him I wasn't involved in no robbery. That's about all I told him.

[39] He says a couple of questions that he wanted to know about some robberies and I said I wasn't involved in no robberies.

Q. Do you remember what he said when he left?

A. He just got up and said—maybe I'm not—I just told him I wasn't involved in none.

He got up and went out the door. That's all he did.

Q. Then what happened?

A. Then Sgt. Bunting came back in.

Q. What did he want this time?

A. He wanted a confession.

Q. How do you know?

A. The way he was talking, you know, about Reed was going to testify and this and that.

Q. So he is—he kept on throwing up these other statements to you.

A. Right.

Q. Did there come a time when he stopped talking?

A. Yes. He seen that I wasn't going to confess, make, you know, he seen that I wasn't going to confess.

Q. Tell me what happened.

A. I remember that it happened, he kept on [40] asking me about the Conga Bar.

He set and he drew some construction route. He put it on his desk and I told him I didn't know about no constructions and he draw a—

Q. You mean a diagram?

A. Diagram.

Q. Of the bar?

A. Diagram. Right.

He drew a diagram of the place and about Tenth Avenue, whatever it happened.

Q. When was he doing this?

A. Oh, after—after I had gave him my statement then he started a drawing diagrams.

Q. Was this after Hallums talked to you?

A. Right.

Q. How long were you down there at the police station all together, if you recall?

A. I'd say I got there at four thirty and I didn't leave until real late at night. I think I got in jail about twelve or one at night. I don't know. Real late.

Q. Were they tallking to you most of the time?

A. When they took me—when they took me out—when they took me out to go to what's [41] its name, I heard one of them say, "Put him in solitary."

I went in and I was sent to solitary. I was put in with a—

Q. Wait a minute. Who did you hear say put him in solitary?

A. One of the police that took me down there. I don't remember who it was.

Q. Was it one of the detectives who had been interrogating you?

A. That's right. I don't remember who it was.

Q. Where were you put when you went to the Pima County Jail?

A. I was put in solitary. Confined.

Q. Were you given any reason?

A. No.

Q. By either the detectives or the jail personnel why you were put in solitary?

A. No. No. No, I couldn't get no reasons.

Q. Were you given any?

A. No. No reason. They just put me in solitary.

Q. When you say solitary, you mean a room with a—

A. A hole with slats in it.

[42] Q. Were you in solitary with anyone?

A. Yes, I was in solitary with a brother. I think his name was Al J. Carter.

Q. You mean another black man?

A. Right. A black dude.

Q. Do you recall what happened, the next thing you remember, the next time you talked to anybody?

A. Well, I stayed in solitary until about nine thirty, nine fifteen. We supposed to have went to arraignment and that's when Marmion and I forget another one just got up on the stand come out there.

Q. And where were you taken?

A. I refused to come out of the hole.

Q. What do you mean?

A. I refused. I told them I didn't want to talk to nobody.

But I was trying to remember the D.O., but he told me I had to talk to him.

Q. Did they take you out of the cell?

A. Solitary.

Q. Yes.

A. Yeah, to go talk to Marmion and his partner.

Q. Where did you talk with Marmion and his [43] partner?

A. Over at the attorney booth.

Q. One of the attorney booths?

A. (Witness nods head.)

Q. Did they have anything with them?

A. They had a tape recorder—they had a tape recorder and they had another tape. They had some tapes.

Q. All right. Do you recall the conversation started when you first saw Marmion and this other detective, the best that you can remember it?

A. Well, first, I came in the door and Marmion was

sitting over here and the detective Hallums was standing right at the side.

I came in the door and—

Q. Hallums or Milne?

A. The one that just testified.

Q. Detective Milne.

A. Milne, right.

Milne closed the door and he said—he said, "Mr. Edwards, I'm from the Homicide—I'm from the Homicide Detective," something like that.

He said, "I'm here on behalf of—to investigate a murder."

[44] Q. All right. What did you do, did you say, if anything?

A. I told him, I said, I—I told him that I didn't want to talk to him.

Q. Then what happened?

A. Then he said, he said, "Now," he said, "we"—he say, "Now"—he asked me—he had a tape recorder and he said—he said, "Now, I have just arrested Soto. Don't play no games with me. I know what Soto talk about."

I say, "I don't even know Soto."

He said, "Yes, you know Soto. Do you want to hear Soto?"

And I say, "Yeah." And he turned the tape recorder on.

Q. Did you hear Soto?

A. Right.

Q. Then what happened?

A. He played the Soto tape nine or ten minutes and then he cut it off.

Q. Then what happened?

A. Then he said—he said they had—he told me they had caught Willie Williams, right.

Q. Okay. What happened?

A. And then he told me, he said it was a [45] little

thing about going—he said—he told me—he said, "I see that you have—you have already—you have already given the D.A."—I mean not the D.A., but "the detectives a jive statement."

He said, "Now, you going to play ball with me?"

I said, "Well, I don't know what you're talking about."

He said, "Well, this can help you. I can talk to the D.A. and give you a break, you know."

I said, "Well, what kind of a break?"

He said, "Well, I can talk to the D.A. and give you a break."

I said, "Man, I wasn't involved in nothing."

He says—he says, "You know—you know how the ball is played. You are a old pro at this game."

Q. Did you eventually give them a statement, talk to them?

A. Right.

THE COURT: Who said this?

MR. BROGNA: Marmion.

[46] THE WITNESS: Marmion.

Q. (By Mr. Brogna) Was there any talk about taping?

A. Right.

Q. Do you recall what that talk was about?

A. I just told him that I didn't want nothing, you know, used against me in the court. I didn't know too much about law, but I just told him I didn't want nothing used against me in a court of law.

I really didn't understand, but that's what I told him.

Q. Do you remember talking about taping a statement?

A. Of who?

Q. You.

A. Oh, yes. They said they wanted me to make a taped statement.

Q. Then what happened, what did you do?

A. I told him I didn't want to make no taped statement because it would be used against me in a court of law.

Q. Do you recall them saying, "If you talk to us, or don't make a taped statement, we are still going to shove it down your throat"?

[47] A. No, sir, they never said that.

Q. You went ahead and talked to them?

A. Yes, I talked to him.

Q. On Friday do you recall saying you didn't give a statement to them?

A. I—on Friday I said I didn't give a statement. The D.A. was talking too fast. I was confused.

Q. Did you give a second statement about the LaConga or didn't you?

A. Yes, I did.

Q. You requested that Sergeant Bunting send somebody out to the jail—

A. No, I didn't.

Q. —to see you and talk to you further?

A. No.

Q. Did you request that somebody pull you out of solitary confinement?

A. No. I refused to come.

Q. But you went.

A. They told me I had to come.

Q. Who told you?

A. A D.O., you know.

Q. A detention officer?

A. Right.

Q. Do you remember his name?

[48] A. I have been trying to remember his name, but I can't. It's been a long time. I'm vague.

Q. When did you go to court that day?

A. I went to court that afternoon about one o'clock.

Q. How long after they were out and talked to you?

A. Before I went to court?

Q. Yes.

A. I think—

Q. In other words, when they were finished talking to you how long was it before they finally took you down to court?

A. Oh, after they talked to me about a hour, two hours. I was took to court in the afternoon. I was tooken to the same arraignment that Williams was tooken to in the afternoon.

MR. BROGNA: I have no other questions.

THE COURT: Mr. Lingeman.

CROSS-EXAMINATION

BY MR. LINGEMAN:

Q. Mr. Edwards, you're a pretty strong fellow.

A. I'm what?

[49] Q. You're a pretty strong fellow, a pretty tough guy.

A. I'm not too tough.

Q. Would it be fair to say that it took three officers to arrest you?

A. Hum?

Q. Would it be fair to say that it took three police officers to arrest you?

A. No. It just took one.

Q. Just one?

A. Right.

Q. How many was there?

A. Bunting and Stevens and a brother, a black officer.

Q. You ran away from the first two, right?

A. Right.

Q. And the brother, the black officer tackled you, caught you.

A. Right. Right.

Q. Then the other two officers caught up.

A. Right.

Q. And then there was a fight between all four of you.

A. No.

Q. No?

A. No.

[50] Q. You just said you got three.

A. That's right. They picked me up and handcuffed me and put a gun to my head and put me in the car.

Q. When you were at the police station nobody told you, but you picked up the phone and it was an attorney.

A. Yes, it was the D.A.

Q. When did you learn that it wasn't the attorney you thought it was?

A. When the man at the other end of the phone said it was a district attorney.

Q. Do you recall that conversation pretty clearly?

A. No, I don't.

Q. Can you tell me, to the best of your recollection, what you remember that man on the other end of the phone saying?

A. He told me he was the district attorney and I said I want a attorney.

Q. He said, "I'm a district attorney"?

A. That's right.

Q. What else did he say?

A. It was a few seconds. It wasn't really no—

Q. Did he try to get you to make a state-[51]ment?

A. No. No, he didn't.

Q. What did he say?

A. He just said he was a district attorney.

Q. Last Friday I asked you three or four times if you gave a statement to Detective Marmion and Detective Milne on the day following your arrest and didn't you tell this court under oath that you never gave them a statement implicating yourself?

A. I never gave them a first time.

Q. Do you remember last Friday my asking you several times when you were under oath whether or not you had given detective Milne and Detective Marmion a statement about your involvement in the LaConga Bar robbery?

A. Like I told you, I didn't understand you. You was talking so fast.

Q. You didn't understand any of the three or four questions I asked you?

A. No.

Q. Isn't it a fact that you decided afterwards that you better tell the truth in this court and—

A. I'm telling the truth all the time.

THE COURT: Just a minute, now. Mr. [52] Edwards, don't interrupt the question and, Mr. Lingeman, let him finish his answers. Start over.

Q. (By Mr. Lingeman) You were lying last Friday, were you now?

A. No, I wasn't.

Q. Did you talk to—with your attorney afterwards?

A. No. My attorney—

Q. Excuse me.

THE COURT: Just a minute. We can only get one at a time.

THE WITNESS: I'm sorry.

Q. (By Mr. Lingeman) That it hurt your case for you to make up a story like that and you'd better tell the truth. Did your attorney say something like that to you after the hearing on Friday?

A. No, he didn't.

Q. You just decided to come in here and decided to tell the truth, that you did in fact give a statement?

A. I just told the truth.

Q. Is it the truth that you asked for a lawyer with Officer Hallums, you asked for a lawyer when he talked to you?

A. I don't know who Hallums is.

[53] Q. The uniformed officer that came in and testified a few minutes ago.

A. He didn't give me time to ask. He wasn't in there for a couple of seconds.

Q. Did you ask Sgt. Bunting, the man involved in your arrest, did you ask him for an attorney, also, is that your testimony?

A. Yes, I did.

Q. Did you ask Detective Marmion and Detective Milne for an attorney, also, when you talked to them the next—

A. I didn't ask to see them.

Q. I know, but when you saw them did you ask for an attorney?

A. They knew I wanted a attorney.

Q. But you didn't ask for one.

A. I didn't think you had to keep asking for a attorney over and over and over.

Q. How many overs and over and overs and over did you ask for an attorney?

A. I asked for a attorney about four times.

Q. How many police officers did you indicate this to?

A. There was so many coming in I don't remember.

[54] Q. Was Detective Hallums one of them?

A. Holmes? I don't understand.

Q. The man with the uniform today, the sergeant.

A. He wasn't in there but a couple of seconds. He

asked me about a robbery and I told him I didn't know anything about it and he didn't hassle.

Q. Was Detective Sergeant Bunting one of them?

A. Yes.

Q. How about Detective Marmion, was he one of the ones you asked?

A. I thought he knew I needed an attorney.

Q. How about Detective Milne?

A. I don't know.

Q. You said you asked at least four different times.

Can you give me a better explanation of who these people were you kept asking for an attorney?

A. I asked Sgt. Bunting for a attorney, to be represented by a attorney.

I asked numerous times, but they kept on coming in and—but, like I said before, I couldn't tell you because it's vague in [55] mind because there was so many police coming in.

Q. Do you remember Detective Marmion and Detective Milne explaining to you that if you talked to them whatever you said they could testify to it in a court; do you remember that?

A. No. They never told me. If I knew this, I wouldn't be up on the stand now.

Q. Did you hear Detective Marmion testify here in court?

A. Oh, yes. I heard him.

Q. Did you hear Detective Milne also testify to that here in court?

A. Yes, I heard that.

Q. And that wasn't correct?

A. No, that wasn't correct.

Q. You stated you were booked into the Pima County Jail about one o'clock.

A. About that.

Q. Wouldn't it be fair to say you were booked into the Pima County Jail about seven o'clock, about three hours after you were arrested?

A. It was real—it was real late. It was like nine o'clock.

Q. Why don't you think about it for a while and tell me if you think it was closer to [56] seven o'clock rather than midnight.

A. It was real late. I don't remember. Real late.

Q. There are records that reflect the time. Can you give me your best estimate?

A. I'll say, like I said before, it was eight or nine or 12 o'clock, but it was—

Q. Wait a minute. Wait a minute. Was it around eight o'clock or—

THE COURT: Just a minute. The attorney is asking a question and then you wait and you answer. Then the attorney has to start over again with a question.

Mr. Lingeman.

Q. (By Mr. Lingeman) Could you give me your best idea of what time it was that you were booked into the County Jail, six o'clock, seven o'clock, eight or later?

A. As I said, I can't approximately remember. All I can say it was very late. To me it was about eleven or twelve, twelve o'clock.

MR. LINGEMAN: Okay. I have no further questions.

THE COURT: You may step down.

MR. BROGNA: I have no further questions.

[57] THE COURT: Defendant Edwards rests on the Motion to Suppress except for argument, of course.

Mr. Lingeman.

MR. LINGEMAN: Detective Marmion very briefly.

VICTOR Z. MARMION,

was thereupon called as a witness in behalf of the State, and having been previously duly sworn, was examined and testified as follows:

THE COURT: Proceed.

DIRECT EXAMINATION

BY MR. LINGEMAN:

Q. Do you know approximately what time it was that Mr. Edwards was booked into the Pima County Jail?

A. Approximately 7:00 p.m.

MR. LINGEMAN: Okay. That's all.

MR. BROGNA: I didn't have a chance to object.

THE COURT: You may object and your [58] objection may precede the answer.

MR. BROGNA: I didn't get a chance. I'm going to ask that that be stricken and if he is going to show the time, then he bring in the records the proper way.

I ask that that answer be stricken.

MR. LINGEMAN: All it means is that I'm going to have to wait until tomorrow when Detective Steve Bunting is here.

THE COURT: I don't think the objection is good if Detective Marmion was there. But right now it looks like foundation.

MR. LINGEMAN: He wasn't there.

THE COURT: Sustained. But I'll give you time to produce the records.

MR. BROGNA: I would like to talk to Steve Bunting.

MR. LINGEMAN: That's it then.

THE COURT: Sustained. And the answer is stricken.

MR. LINGEMAN: That's all I have right now.

THE COURT: Mr. Brogna, you can't have anything, I guess.

You may step down.

(Witness leaves the stand.)

[59] THE COURT: Do you have other witnesses?

MR. LINGEMAN: Not now, Detective Bunting is not in town, Steve Bunting.

THE COURT: Steve Bunting?

MR. LINGEMAN: Is not in town. That's why he wasn't called last week or today. I didn't think we were going to need to call him.

I talked to Carmine before and he didn't think there was a need to call him.

THE COURT: Do you want this hearing continued to produce records?

MR. LINGEMAN: I guess so. Detective Bunting won't be back this afternoon. He is out of town. He has been out of town.

THE COURT: Do you want until tomorrow morning?

MR. LINGEMAN: Yes.

THE COURT: Mr. Brogna.

MR. BROGNA: That's fine, Your Honor.

THE COURT: All right. I have to get my calendar.

MR. LINGEMAN: I might say it won't take me very long. A minute or two.

Your Honor, I may be able to get Sergeant Bunting who may be able to answer this [60] question right now.

THE COURT: All I need to know is whether you want to do it now or then.

We stand at recess for ten minutes.

MR. LINGEMAN: Thank you.

THE COURT: We'll continue with the Edwards motion unless you're not ready.

If you're not ready, we'll continue with the Williams Motion except Mr. Noe isn't here.

MR. LINGEMAN: I'm ready with Sergeant Bunting on the Edwards motion.

THE COURT: All right.

[61] LARRY BUNTING,

was thereupon called as a witness in behalf of the State, and having been previously duly sworn, was examined and testified as follows:

THE COURT: Good afternoon.

THE WITNESS: Good afternoon.

DIRECT EXAMINATION

BY MR. LINGEMAN:

Q. Please state your name and occupation.

A. Larry Bunting, Police Sergeant, City of Tucson.

Q. You are the same Larry Bunting that testified earlier in this motion?

THE COURT: The record may so show.

Q. (By Mr. Lingeman) Sergeant Bunting, when you arrested Mr. Edwards, could you explain the physical circumstances surrounding that arrest very briefly?

A. Well, there was a—he resisted arrest and a struggle ensued and eventually he was subdued and taken to the station.

Q. Between Mr. Edwards and yourself and who else?

A. Detective Steve Bunting and a uniform [62] officer.

Were all three of you police officers engaged in trying to make the arrest on Mr. Edwards?

A. Yes, sir.

Q. Did you have some difficulty doing that, even all together the three of you?

A. Yes, sir.

Q. About what time—I guess it was about four o'clock, is that right, when the arrest was made?

A. That is correct.

Q. About what time was it that the interviews with Mr. Edwards were completed that afternoon or evening, the total interviews?

A. In the neighborhood of six thirty to seven, I would guess.

Q. And at that time was Mr. Edwards taken to the County Jail?

A. Yes.

MR. LINGEMAN: That's all I have.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. BROGNA:

Q. During the time from his arrest and [63] the time he spent in the police station, during most of that time was there someone talking to Mr. Edwards?

A. Yes.

MR. BROGNA: I have no further questions.

MR. LINGEMAN: Nothing, Your Honor.

THE COURT: You may be excused.

(Witness excused.)

MR. LINGEMAN: That's all I have.

THE COURT: Mr. Brogna?

MR. BROGNA: I have nothing further.

THE COURT: Mr. Brogna, do you want to argue the motion?

MR. BROGNA: Very briefly, Your Honor.

In addition to the cases that are cited in Mr. Polis' memorandum, I would call the Court's attention, first of all, to the one case cited in particular in the Polis memorandum, State v Saube, 112 Ariz., 576.

THE COURT: Mr. Bailiff, will you get 112 Arizona for me?

MR. BROGNA: I think the case is appropriate because in that particular case the detective did attempt to elicit a statement at one time and the statement was not procured.

(CAPTION OMITTED)
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[37] That is not the situation in this case. The Court finds that there was no request from these officers that the Defendant Williams be furnished with any methadone or any other drugs, that they did not make any promises to him that he would receive any drugs in response or after making his statement.

The Court finds that the Defendant Williams' statement was voluntary and the State may use it in the presentation of their case.

The Defendant Edwards' Motion to Suppress, it is ordered that the motion is granted.

The Court wants to fully explain the reason on that for the record and further to show on the record that even though the Court is prohibiting the State from using it in their case, that the Court finds the statement was voluntary except for the violation of Miranda which the Court is going to go into, and that the State may use the statement for cross-examination in the event the Defendant Edwards takes the stand. They may use the statement in rebuttal should it become otherwise material and proper rebuttal.

Now, the Court again is basing this ruling on the officers' testimony which the [38] Court finds to be the credible evidence before the Court on that particular motion, not Mr. Edwards' testimony.

The officer's testimony, Sergeant Bunting, is that Mr. Edwards was questioned at the police station following his arrest and before he was ever taken to jail. That at that time Mr. Edwards gave a tape-recorded statement which has been referred to in his case as the alibi statement. That the officers did not believe that statement.

That after that there was a discussion initiated by Mr. Edwards concerning a deal. That there was further conversation between Mr. Edwards and the officers which was concluded by Mr. Edwards saying, in effect, that he would wait until he got his attorney before he made any deal.

The Court believes and finds that the deal so far as Mr. Edwards' state of mind and concept of it is concerned, involved him making a statement, presumably a true statement, in view of the fact that he had already made the other one, in exchange for some leniency, some lesser conditions or something of that nature.

Under Miranda I think that this is, and under the Sixth Amendment, at least an [39] indication in some way, to use the words of Miranda, that Mr. Edwards intended to have an attorney and intended not to make any statement until he was represented by counsel.

Following that, and I note also at that point the questioning stopped, and I believe that the questioning would not have stopped and Sergeant Bunting would not have stopped questioning Mr. Edwards had he not believed that at that point there had been such a request made.

Then the next day officer Marmion goes to the jail on the morning of the day that Defendant Edwards would have gone to his initial appearance and gotten an attorney, which the detective knew.

Detective Marmion goes to the jail on his own. There is no evidence to the contrary, and questions the defendant.

I don't think there was anything wrong, any compulsion, anything of that kind on the Defendant Edwards by Detective Marmion. There is no evidence of it that the Court believes, but, nevertheless, the right which Mr. Edwards had exercised the day before with Officer Bunting had been ignored and it doesn't matter whether [40] Detective Marmion knew it or not, it was contrary to Miranda. That's contrary to what Miranda says.

Now, I have studied the Arizona cases in this record as thoroughly as I know how. I think that the case is in point with the Saube case. That involves the defendant asserting his right to remain silent.

I think this case involves the defendant asserting his right to have an attorney before he made any statement, but the two are common rights under the Miranda, one under the Fifth and one under the Sixth Amendment. I think Saube is controlling on this Court.

I have also studied the Edwards case. I don't think it lends a great deal to this case. This is not the Edwards case. It is not a case of the detectives continuing to hound the defendant and things of that nature. It is not an extreme case at all. Edwards was a most extreme case.

I have also studied State v Burger, 105 Ariz., 553, and which overrules State vs. Herman. That's the case in which the Supreme Court said that a statement can be voluntary and used by the State even though the defendant is [41] represented by an attorney.

In that particular case the statement was given at the County Jail to the officers even though the defendant had an attorney representing him in the case in court.

But in that case it was the defendant who requested that the officers come to the jail and talk to him. That is not this case.

I think if you had that one additional fact in this case that the Court's ruling would be different. But this is a case of the officers going to the jail after Mr. Edwards had at least in some way indicated that he intended to have an attorney in this case before he made any statement.

That will be the Court's ruling on that matter.

Now, I want to ask counsel a question. I want to ask you if in view of the Court's rulings anyone believes that the matter of severance as to the two defendants should be reopened. Mr. Lingeman.

Mr. Lingeman: May we approach the bench on this with counsel—I don't know if counsel are still representing—

THE COURT: I don't know who I meant

[55] Tucson, Arizona
March 14, 1977
Monday, 11:45 a.m.

THE COURT: Case No. A-30683, State vs. Robert Edwards.

The Court set this as the time for hearing the defendant's own Motion for a Redetermination of Competency

and after my ruling last Friday Mr. Lingeman came in and told me that he had filed this Motion for Reconsideration of the Order Granting the Motion to Suppress, Confession. I told Mr. Lingeman I would hear it this morning. I thought I should.

Are you prepared to respond to that, Mr. Brogna?

MR. BROGNA: Yes, Your Honor, I have been provided a copy.

THE COURT: I'll hear from Mr. Lingeman, if you want to add anything to your written motion.

MR. LINGEMAN: Your Honor, the motion just indicates, of course, as Mr. Brogna has seen, that I found a case that deals specifically with that which the Court felt there was a problem.

I say that because the Court indicated specifically the reasons for its ruling when it granted the Motion to Suppress, the reason [64] were properly before it.

So for the reasons that I have indicated, and for the apparent specificity of this decision, I would urge the Court to reverse its earlier ruling.

THE COURT: Well, I'm going to reconsider the matter and change the ruling.

I think that I was wrong, based on the law that I'm bound to follow.

Travis was decided by the Court of Appeals January 27th, 1976, and Saube January 29th, 1976 by the Arizona Supreme Court.

But in the Travis rehearing our Court of Appeals was denied March 4th, 1976, and the Supreme Court denied review March 23rd, 1976, all coming after the decision in Saube.

I think Travis is exactly in point even down to the same officer, as exactly in point as you could get two cases with this kind of a situation.

The Court was not aware—I want the record to show I remembered Travis once it was handed to me, but I didn't recall it at the time I made this ruling. It wasn't annotated

in the place I was looking and I just was not aware of it. I think it's controlling on the [65] Court. I think I have to follow it.

I had, of course, studied Mosley extensively before making that ruling on Friday and I had thought that Mosley, the controlling thing in Mosley was that the second officer had talked to him about a different crime. I thought that was an exception that the Supreme Court had grafted on Miranda, but Judge Howard at the Court of Appeals, with the Supreme Court denying review, has stated that Mosley means a great deal more than that and I'm going to change the ruling and the defendant's Motion to Suppress is denied as to all the statements and the Court finds the statements to be voluntary.

Now, I'll hear this matter about competency, Mr. Edwards.

MR. EDWARDS: Your Honor, I have not prepared the motion to competency. I haven't had time to study the hearing and study the motion.

You gave a order to give time, but we have not had time to study for trial. I haven't even had time to study the material for rehearing.

I had a witness doctor and he's not here and I have just not had the time.

You gave a order or something for the sheriff for us to have time to review the

(CAPTION OMITTED)

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[2-58] Q. Milne?

A. Yes.

Q. Detective Mr. Milne, that was on the date of the 20th you say.

A. The 20th of January, yes.

Q. About nine thirty in the morning?

A. Roughly, yes.

Q. How could—how did you come out to the jail, did anybody tell you to come, did your—your lieutenant or I know they have a top person there, ask you to come and interview me?

A. My supervisor instructed me to accompany Detective Marmion, yes.

Q. Who was your supervisor that asked you to come and interview me?

A. Sgt. Bunting.

Q. So Sgt. Butning asked you to come to interview me to make a confession, am I correct?

MR. LINGEMAN: Objection. That's not what the witness testified to.

THE COURT: You may answer. Overruled.

THE WITNESS: Iwas instructed by Sgt. Bunting to accompany Detective Marmion to the Pima County Jail where you were located at the time and conduct an interview.

Q. (By Mr. Edwards) Did Sgt. Bunting tell [2–59] you that he had already interviewed me?

A. No, sir, he did not.

Q. You came out there the morning about nine thirty and you were with Detective Marmion.

A. Yes.

Q. When—do you remember where I was? I mean, where you was to the interview, where you hold the interview that morning?

A. Yes. It was in one of the attorneys' booths.

Q. Mr.—before you interview me, I didn't have a attorney then, did I, when you come to interview me?

A. I don't know if you had one at that point or not.

Q. You know how I think, Mr.—Mr. Milne, you have been in homicide—how long have you been in homicide?

A. I was in homicide approximately 13 months.

Q. Thirteen months. So I think you know how the Court procedures go.

A. Somewhat.

Q. When you came down that morning, I was arrested January 19th, I think you recall that.

A. Yes.

Q. And I was brought to jail that night and [2–60] that morning I was supposed to have went to arraignment; is that correct?

A. It would be the following afternoon.

Q. I never went to arraignment while you was supposed to come down and interview me, am I correct?

A. You had not been to any type of a court arraignment prior to the time we talked to you.

Q. Mr. Milne, is arraignment where attorneys is appointed?

A. In some cases, yes.

Q. So I never had a attorney, am I correct, when you investigated—interrogated me.

A. I don't know, Mr. Edwards. It would be very possible for you to have a private attorney.

Q. So you're telling the Court that Sgt. Bunting asked you to come see me on that morning.

A. Sgt. Bunting instructed me to accompany Detective Marmion.

Q. Mr. Milne, on that—on that—when we can come down to recall that when you was in the little—the little law booth or attorneys' booth or what we can refer to—the D.O., did you send a D.O. to come get me?

A. A detention officer?

Q. Right.

(CAPTION OMITTED)

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[9] THE COURT: Good Morning, Mr. Edwards, you may proceed.

MR. EDWARDS: My next witness is Larry Bunting.

LARRY BUNTING,

was thereupon recalled as a witness in behalf of the defendant and, having been previously duly sworn, was examined and testified as follows:

THE COURT: Detective Bunting was sworn earlier in this trial and is being recalled and is, of course, still under oath.

You may proceed, Mr. Edwards.

DIRECT EXAMINATION

BY MR. EDWARDS:

Q. Mr. Larry Bunting, am I correct, is that your name?

A. Yes.

Q. Did you give testimony to the Court that I—on the day of January 19th, 1976, the day you arrest me and took me to jail, didn't you give testimony that you never sent Milne over [10] to see me the next day?

A. That is correct.

Q. Can you occur that when Milne testified that he testified and said that you sent him that day?

A. Would you repeat that again, please.

Q. I'll repeat it and make it more clearly for you.

Mr. Milne testified and said that Larry Bunting—Larry Bunting, is that you?

A. That's me.

Q. Sent him on the next day, the 20th day, that you gave orders for him to go see me on the 20th.

A. I didn't tell him to go see you. I never told anybody to go see you.

I may have put two officers arriving together as I do occasionally, like assigning Milne to ride with Marmion, but I have never assigned Marmion to go see you or Milne to go see you.

Q. So we can indicate that Milne, he didn't—he just—he must have forgot that that you sent him or you didn't send him, am I correct?

A. I'm not sure what he testified to. I can only testify to my recollection.

[11] Q. Your recollection.

On October 9th, 1974, Mr. Bunting, was you ever—did you ever approach the crime—the crime that was recently—did you ever investigate the crime when it was over, the crime of the death of Mr. Mungiå, the robbery, was you on that investigation?

A. Yes, I was involved in the investigation of Mr. Mungia's death.

Q. Was you involved in the investigation on October 9th of 1974?

A. I believe that's the date it occurred. Yes, I was.

Q. Mister, did you ever find any articles or things in the investigation; did you ever find any fingerprints, did you ever find any—anything, guns, anything occurring to the crime?

A. I myself did not.

Q. Did you know about anyone finding any guns inside the place or anything, for instance, anything to identify the suspects?

A. To the best of my recollection, as I have not reviewed the reports to refresh my memory, I don't recall anything about guns, fingerprints being found.

There were fingerprints found. As

(CAPTION OMITTED)

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[61] LARRY BUNTING,

being first duly sworn, was examined and testified as follows:

THE COURT: The witnesses in this case are under the Rule so you'll have to leave the courtroom after you have finished testifying. You're not to discuss your testimony with anyone except the attorneys until the case is over.

Thank You.

DIRECT EXAMINATION

BY MR. LINGEMAN:

Q. State your name, please, and occupation.

A. Larry Bunting, Police Officer for the City of Tucson.

Q. How long have you been so employed?

A. Since 1960.

Q. What detail are you in right now?

A. I'm presently in the uniform division.

Q. At any time prior to this time were you in the homicide division?

A. Yes, I was.

Q. For how long?

A. Nine years.

Q. Were you the head of that division?

A. I was.

[62] Q. Up until when?

A. Couple of weeks ago.

Q. Are you familiar with the La Conga Bar robbery-murder that occurred back in October 1974?

A. Yes, I am.

Q. Did you take part in the investigation of that case?

A. Yes, I did.

Q. Was it your case or did you assign it to one of the men under you?

A. Detective Marmion was assigned as the lead detective.

Q. What does that mean?

A. It means he was the detective charged with the primary responsibility of investigating the case and my position was as a supervisor of the overall detail.

Q. January 19th, 1976, did you make an arrest reference that case?

A. Yes, sir.

Q. An arrest of the person by the name of Robert Edwards who also goes by the name of Willie Barfield?

A. Yes, Sir.

Q. Do you see that person in the courtroom?

[63] A. Yes, sir.

Q. Point him out.

A. Sitting at the defense table to Mr. Brogna's left wearing a blue shirt.

MR. LINGEMAN: May the record reflect the witness pointed out the defendant?

THE COURT: Yes.

Q. (By Mr. Lingeman) Can you tell us the circumstances of that arrest?

A. He was arrested per an arrest warrant. He was arrested on East 24th Street in Tucson, the evening of the 19th or about 4:00 in the afternoon.

Q. Who else was present?

A. Detective Steve Bunting.

Q. Any other uniform officers?

A. One uniform officer.

Q. How did you affect the arrest, what happened?

A. Went to the door of the apartment, identified our-

selves. Mr. Edwards came to the door, showed him a copy of the warrant. There was an altercation, struggle between us and he was eventually subdued and taken to the police station.

Q. Could you be a little more specific [64] about the altercation or the struggle?

A. He resisted. There was a struggle. Knocked down a block wall effect dividing the apartment. He started around the corner and a uniformed officer intercepted him and there was a struggle and he was handcuffed and taken to the station.

Q. Had you asked—had you advised him what the charges were, what the arrest was for?

A. I had advised him of the charge and showed him a copy of the warrant.

Q. Before he attempted to escape?

A. That's correct.

Q. He was subsequently apprehended?

A. Yes, sir, he was.

Q. Taken to the Tucson Police Department?

A. That is correct.

Q. Was he advised of his constitutional rights?

A. He was advised of his rights at the police station.

Q. Okay.

Were you present at that time?

A. Yes.

Q. Can you advise the jury of the exact rights of which he was advised?

[65] A. I read to him from this rights card. He was advised that you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning, and to be with you during questioning, if you so desire.

If you cannot afford an attorney you have the right to have an attorney appointed for you prior to questioning.

He was asked: Do you understand these rights? He stated he did.

Now, having been advised these rights and understanding these rights, will you answer my questions? He stated he did and he talked to us after being advised of those rights.

Q. How long did you talk to him at that time?

A. That evening?

THE COURT: Just a minute.

MR. BROGNA: May we approach the bench?

THE COURT: Yes.

(Thereupon, a conference was had at the bench out of the hearing of reporter and the jury.)

[66] MR. BROGNA: During the course of questioning I didn't stand up at the time because Sgt. Bunting—Mr. Lingeman seems to always have this, but Mr. Lingeman characterized Mr. Edwards' movements at the time of the arrest: Is that when he attempted to escape? Yes, it is, before any objection could be made. It's a prejudicial characterization of the evidence which only the jury can make.

I think they know if they start talking fast they can get away with it with the defendant depending on himself. That's not fair. The defendant makes a motion for mistrial on the basis of those comments.

If the Court is not going to do that then an indication to Mr. Lingeman and Sgt. Bunting to give us a chance to object.

THE COURT: Mr. Lingeman, on the mistrial.

MR. LINGEMAN: I oppose the motion.

THE COURT: All right. The motion for mistrial is denied and I'll caution counsel.

(Bench conference concluded.)

THE COURT: Mr. Lingeman and Sgt. Bunting, in asking the questions and in giving answers, please hesitate long enough so that the [67] defendant may make a legal objection if he has one. Thank you.

Q. (By Mr. Lingeman) I think the last thing I was asking was how long you had your conversation at the police station?

A. Approximately two and a half to three hours that evening my total contact with the defendant.

Q. At some point in time was there a tape of the conversation between you and Mr. Edwards?

A. Yes.

Q. Okay.

Was that immediately or was that some time during the course of these hours?

A. It was fairly shortly after arriving at the police station he wanted to give this statement.

Q. Who else was present at the time that this formal statement was given?

A. Detective Steve Bunting.

Q. Just the three of you—yourself, Steve Bunting, and Mr. Barefield or Mr. Edwards?

A. That is correct.

Q. Okay.

What proceeded, if anything, that you [68] remember from this taped conversation?

A. Prior to the taped statement I was advised—advised him of his rights again on the tape.

Q. Okay.

Did you have any other conversation that wasn't on the tape before this?

A. Just a short conversation discussing the charges. I explained to him other people had been arrested in the case and they made statements incriminating him as an accomplice in the case and that we were interested in getting his side of the story, and he stated he had an alibi. He wanted to make a statement concerning his alibi.

Q. Do you have that tape with you?

A. I do.

Q. Could I have it, please?

Do you recognize what has been marked here as State's 3 for identification?

A. This is a transcription of the recording, tape recording.

Q. Now, what has been marked as State's 4 for identification?

A. This is the casette tape.

MR. EDWARDS: Your Honor, objection on [69] the grounds I previously argued on the grounds.

THE COURT: Overruled.

THE WITNESS: This is the casette tape of the statement given by Mr. Edwards.

Q. (By Mr. Lingeman) I move to admit State's 4 at this time, Your Honor, and State's 3.

THE COURT: I think defense already has a copy of this.

Three and four have been offered.

MR. EDWARDS: Yes, Your Honor. I would ask—I would like to ask questions of the witness—where was the tape at—

THE COURT: You may voir dire the witness.

VOIR DIRE EXAMINATION

BY MR. EDWARDS:

Q. Mr. Detective Marmion—Bunting; am I correct?

A. Yes.

Q. Where was this tape held?

A. At the police department with Detective Marmion.

Q. How long was it held?

A. It's been held since the statement was [70] taken?

THE COURT: Do you have any objection to the admission of the exhibit?

MR. EDWARDS: No.

THE COURT: Exhibits 3 and 4 will be admitted.

DIRECT EXAMINATION (Cont.)

BY MR. LINGEMAN:

Q. Detective Bunting, do you think you could play that tape for us right now?

A. Surely, if I could have a moment.

THE COURT: Do you have an extra copy of the transcript?

MR. LINGEMAN: No.

MR. BROGNA: Excuse me, before that's played I'd like to have an opportunity to read the exhibit myself. I just glanced at it. If the Court please.

THE COURT: All right. Here it is.

MR. BROGNA: Thank you.

THE COURT: We'll just wait until you have had a chance to read it.

MR. BROGNA: If it please the Court, I'd like to approach the bench.

THE COURT: All right.

[71] (Thereupon, a conference was had at the bench out of the hearing of the jury.)

MR. BROGNA: There is mention in the statement of the prior robbery. I think Mr. Lingeman knows of that and I think he should have brought it up to the court—to the court's attention. I thought I remembered it that's why I asked to read it again.

It is extremely prejudicial and should have been brought to the court's attention, it should be expunged.

MR. LINGEMAN: I haven't listened to the tape or read that statement in a long time. I'd be happy to look at it.

THE COURT: Well, it's clear to me that it's going to require that something be done so you can go on with the witness or other matters and then we'll do this in the absence of the jury before the noon hour.

MR. LINGEMAN: Okay.

(Bench conference concluded.)

Q. (By Mr. Lingeman) Approximately how long does this last?

A. I believe it's less than 30 minutes as I recall.

Q. Okay.

[72] Essentially this is a statement in which Mr. Edwards gave an alibi; is that correct?

A. That's correct.

Q. Okay.

Now, after this statement was completed what transpired in the way of conversation between you and Mr. Edwards?

A. There was further conversation between us concerning the charges.

Q. What was that conversation?

A. Basically Mr. Edwards wanted to make a deal. He talked about if I could give him a deal or the County Attorney's Office could give him a deal he then would give a statement concerning the events that occurred.

Q. What did you indicate to him?

A. Told him I was in no position to give him a deal and that—well, essentially we ended up calling the County Attorney, a member of the County Attorney's Office and the County Attorney talked to him over the phone, and it was left that Edwards wanted to wait until he had an attorney to make a deal for him concerning the charges.

Q. Okay.

[73] You said the County Attorney was contacted. Was that someone else in my office?

A. That is correct.

Q. Randy Stevens?

A. Right, Randy Stevens, the Chief Criminal Deputy.

Q. Was there—were you present when Mr. Edwards spoke with Mr. Stevens over the phone?

A. I was.

Q. What did you hear Mr. Edwards say over the phone at that time?

A. Basically that he wanted a deal to give his side of the story.

Q. He had already given his side of the story, hadn't he, on the tape?

A. The tape, yeah, but apparently there was a different story that he wanted a deal to give this information.

Q. Okay.

Another statement, a different statement?

A. Yes, sir.

Q. But did he ever give a different statement on that day?

A. No.

[74] Q. No deal was ever made between either you or myself and Mr. Edwards, also known as Mr. Barefield?

A. That is correct.

MR. LINGEMAN: That's all I have, Your Honor.

THE COURT: You may cross-examine and the County Attorney has reserved the right to recall this witness and if that is done then you may also cross-examine at that time.

CROSS-EXAMINATION

BY MR. EDWARDS:

Q. You are Sgt. Bunting?

A. That's correct.

Q. Arrested me when did you say?

A. 19th of January.

Q. 19th of January.

Who was with you on the time on the arrest, who was the other homicide detective?

A. He's named Detective Steve Bunting, no relation to me, and there was also a uniform officer.

Q. Right. So you say you approached the house, right?

A. Yes.

[75] Q. Did you have any guns with you or anything?

A. Oh, yes.

Q. You knocked on the door?

A. Yes.

Q. Did you know who came to the door?

A. Yes.

Q. Who came?

A. You came to the door.

Q. Was anybody in the surroundings when I came to the door, children playing outside or you don't remember?

A. I don't recall children. I recall there was a lady came to the door with you.

Q. That's when you showed me your warrant?

A. That is correct.

Q. You told me I was arrested for first degree murder and armed robbery, and armed burglary?

A. Right, and showed you the warrant.

Q. Did I step out or you pulled me out?

A. You were standing in the door and you started saying: No, no, no, and I pulled you outside and started to shake you down, and then that's when the struggle really started.

Q. You pulled me out of my house?

A. That's correct.

[76] Q. What kind of complex was there, do you remember?

A. An apartment complex.

Q. Apartment complex.

Do you remember—do you remember people outside?

A. No, I don't.

Q. You don't.

Did you have your guns drawn when you pulled me outside?

A. No.

Q. You never did?

A. No. Eventually I did pull my weapon, but not when I pulled you outside.

Q. Did on—did you pull your weapon around the kids?

MR. LINGEMAN: Objection, Your Honor. It's irrelevant and argumentative.

THE COURT: Sustained.

MR. EDWARDS: Detective Bunting, when I went to the police station that night I believe I gave you alibi statement, right?

A. That is correct.

Q. Alibi statement saying I was with another person, that's what I call an alibi statement.

[77] A. That's what I call it and that's what you called it in your own words.

Q. Did I call it alibi statement?

A. You said: I have got an alibi.

Q. I was with somebody else?

A. That's what you stated.

Q. Did you do all the questioning?

A. No, Steve Bunting also talked with you.

Q. No other policeman?

A. And Detective Halms talked with you at one point.

Q. Group of them talked to me?

A. The three of us talked to you.

Q. Just three?

A. Three.

Q. At any time when I gave you a taped statement at any time involve myself in the crime, when you even said about a deal did I involve myself in the crime?

A. In the taped statement.

Q. Even when I was talking to you after the taped statement?

A. Not directly, indirectly.

Q. Did I involve myself, did I tell you I was at the scene of the La Conga Bar?

[78] A. No, you never told me you were at the scene.

Q. Did I tell you me and others were at the scene of the La Conga Bar?

A. No, you didn't tell me that.

Q. Then a deal is supposed to have been raised after that.

A. That is correct, you stated that you had been around and understood how things worked and you wanted a deal.

Q. So I told you I wasn't involved and then I said I wanted to make a deal?

A. That is correct.

Q. Mr. Bunting, did you ever play any tape recorder to me and tell me anybody else was involved?

A. Yes, I told you other people were involved and I read part of a statement to you.

Q. From who?

A. As I recall, it was Kevin Reed, Cleveland Reed.

Q. You say he was involved?

A. Yes.

Q. That's when you took this taped statement?

A. I beg your pardon?

[79] Q. That's when you took the taped statement after you told me Kevin Reed was involved?

A. That's when you gave your alibi, yes.

Q. You forgot to read me my rights in there?

A. No, your rights were read to you twice. Once immediately after arriving at the police station and once again on the tape.

Q. Sgt. Bunting, you just said after you gave the statement then you gave me a taped statement—do you understand what I'm saying?

A. No, I don't understand.

Q. You said after you read these statements to me and then you told me I wanted to tell my side of the story, that I gave a statement. You never said—you never said you read no rights to me. You just said that, Mr. Bunting—are you changing your story now?

MR. LINGEMAN: Objection, that's not what the testimony was.

THE COURT: Sustained.

Q. (By Mr. Edwards) Mr. Bunting, did you ever after you took me—after you said I asked for a lawyer to make a deal, did you ever take me back to the police station, I mean, back to the jailhouse, you wasn't the one?

[80] A. No, you were taken to jail that evening, but I did not transport you.

Q. But I would—after the interrogation room where I was at I never told you I was involved in anything?

A. Not directly.

Q. All right—or I knew who was involved?

A. Not directly.

Q. And my statement—did I ever say I was involved?

A. Not directly.

Q. What you mean not directly, in my statement did I say I was involved?

A. In your statement you stated at one point you had heard some stuff on the street, but you didn't want to say.

Q. Just talk, did I say talk?

A. I don't recall the exact words. It's on the tape.

Q. You'd have to read the supplement?

A. I beg your pardon?

THE COURT: Are you looking for the statement—it's Exhibit C—I'm sorry—Exhibit 3.

Q. (By Mr. Edwards) Is this refresh your [81] memory?

A. What is your question now—your exact words, your exact words concerning that?

Q. Right, was anywhere I said that I was involved in that statement?

A. As I previously testified you never stated directly that you were involved.

Q. Or that I knew who was involved?

A. That is not correct. You implied in your statement that you knew.

Q. I implied that I knew who was involved?

A. Correct.

Q. What page was that, Detective Bunting?

MR. LINGEMAN: I'm going to play the tape in a short while. I wonder if we could reserve this area of cross-examination until the tape's played. It could save a lot of time.

THE COURT: Overruled.

THE WITNESS: Okay. Page 6—would you like for me to read it?

Q. (By Mr. Edwards) Yeah, you can read it.

A. Okay.

Q. Starting with the second question, question by myself:

"Question: Okay, have you talked to [82] Willie Williams about this?

A. No, sir. I ain't seen him.

Q. Okay, previously before we turned on the tape you said that you had heard who did it and knew what was behind it.

A. Yeah, like in the street, everybody heard, I heard, you know names and things.

Q. Okay. Who did you hear did it?

A. Oh man, I, I really, uh—I can't, I really can't, man, really state that now, man, 'cz, uh, really, really ain't me, you know. Uh, I heard some names, just like you all heard some names, I heard, you understand me, names of people, they was putting everybody in it, then, just, you understand, you understand, as far as I heard, it was some Mexicans who did it. And I heard it was some brothers who did it, it was, it was, you know, it was a lot of, a

whole different side of the story, you know. You know they really didn't know who did it, they said it was some Mexicans did it and then they turn around and say it was some brothers who did it, and the people down there say, you understand, I heard from, uh, some kind of evidence that I heard, you understand, it was some Spanish dude, you understand, who did it, so now, really, you understand [83] me, I don't, I don't really know who, you understand, really who did it, but I—I heard like you said before, I too, I heard some names in the street, just, you know, boom-bam, you know how people talk."

Do you want me to continue?

Q. You just read.

A. That was your answer.

Q. Now, that refers I told you who did it?

A. No, it implied to me that you have information concerning it.

Q. Just the information what I hear on the street, hearsay information, Mexican, what I say Mexicans, brothers, it could have been anybody.

A. That was your answer.

Q. Right. Okay.

So then you took me—did I tell you any time when I left the place after I gave my statement I wasn't involved directly as you say and when I left the police station and I didn't say I was involved or nothing, but then you did—you tell me any time that I said I was going to call you back and talk to you—did I tell you any time—well, I'm going to call you back and talk to you?

[84] A. No.

Q. I say that?

A. No.

Q. Did I tell any police officers that?

A. Not to my knowledge. Not in my presence.

Q. Mr. Bunting, did you investigate—was you on the detail of the homicide in October 9th of 1974?

A. I was.

Q. Was you on the scene of the crime?

A. I responded to the scene, yes.

Q. Did any time that—did you speak to anybody around the scene of the crime that night?

A. Yes, I did.

Q. people?

A. People.

Q. Right.

A. Yes, I did speak to some people.

Q. Did anybody around the bar have eye witnesses that didn't you ask did anybody know anything about the robbery around the residence?

A. Did—

Q. You questioned people around the residence, a robbery occurred, even a murder—you didn't question nobody about it?

[90] County Attorney.

(Noon recess.)

THE COURT: Call your next witness.

MR. LINGEMAN: I'd like to call Sgt. Bunting.

THE COURT: All right.

MR. LINGEMAN: If I could show Court and counsel Exhibit 3 again.

THE COURT: Show it to counsel and if there's any objection I'll look at it.

MR. LINGEMAN: I'll remove to admit Exhibit 3.

THE COURT: It's been admitted. I didn't make any different ruling.

MR. LINGEMAN: Okay.

LARRY BUNTING,

the witness herein, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Cont.)

BY MR. LINGEMAN:

Q. Okay.

Let me show you what has been marked as 4-A for identification, State's 4-A.

A. Yes, sir.

[91] Q. Do you recognize that?

A. Yes.

Q. What is that?

A. It's a casette copy of the statement made by Mr. Edwards.

Q. The copy that's already been marked as State's 4 for identification.

A. That is correct.

Q. Was that just done over the noon hour?

A. Yes, it was.

MR. LINGEMAN: I'd move to admit 4-A, Your Honor.

THE COURT: All right. 4-A will be admitted and the Court will change its ruling and 4 is not admitted.

Q. (By Mr. Lingeman) Could you play this for us, Detective Bunting?

A. Yes.

(Whereupon, the tape was played for the jury.)

Q. (By Mr. Lingeman) Thank you, Sgt. Bunting.

You indicated earlier today that when you arrived on the scene of the La Conga Bar that Mr. Mongia, Sr. was on the floor; is that correct?

[93] MR. LINGEMAN: Okay. That's all the questions.

THE COURT: You may cross-examine again.

CROSS-EXAMINATION (Cont.)

BY MR. EDWARDS:

Q. Mr. Bunting, after I gave you that taped statement and told you I was—I had an alibi, when you arrested me

was I with—did you find out I was with the same young lady that you arrested me at the same house that day?

A. According to your statement that is correct.

Q. And after I told you, after I told you she was my alibi witness did you go and question her about it?

A. No, I did not.

Q. When you took me to jail, police officers took me to jail and put me in solitary, did any time I ask you, your police officers to or did you when I left did I want to talk to you all further after I made that statement?

A. I don't know what you said to anybody else. To my knowledge you did not request to talk to me additionally.

[94] Q. Was you over the case at that time?

A. I was the supervisor of the homicide detail, yes.

Q. You still—you still in homicide?

A. No.

Q. When the time when you was on the scene of the crime did you contact Dr. Brucker yourself?

A. I believe I had the dispatcher get ahold of him.

Q. You and Dr. Brucker was there at the scene, you and Dr. Brucker was there then at the same time; am I correct?

A. Yes.

Q. That night on October?

A. He responded to the scene and observed the scene and the body of Mr. Mongia.

Q. Right. He observed the body.

A. Yes.

Q. Did you observe the body too?

A. Yes, I did.

Q. Did you come to the conclusion of the death of the body?

A. Come to the conclusion that the body was dead, yes.

Q. I mean, that the death was a murder, [101] thank you.

MR. LINGEMAN: Detective Marmion.

THE COURT: Any other witnesses here besides Detective Marmion?

MR. LINGEMAN: Not that I know of.

THE COURT: It's just easier to put them under the rule at once.

VICTOR MARMION,

the witness herein, being called and previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LINGEMAN:

Q. Please, state your name and occupation.

A. Victor Marmion, homicide detective, Tucson Police Department.

Q. How long have you been so employed?

A. A police officer approximately ten and a half years. As a homicide detective almost four years.

Q. Did you have occasion to become involved in the investigation of the armed robbery, murder, armed robbery of the La Conga Bar?

A. I did.

Q. Was that back in 1974, October of '74?

[102] A. Yes, sir.

Q. Did you respond to the scene on the night the incident occurred?

A. I did.

Q. Did you follow the investigation from then until the present time?

A. I did.

Q. Can you tell me what you did on the night that the incident occurred as far as investigating the crime?

A. Well, I previously looked over the scene and my assignment was to interview the second victim, Mrs. Esparza, Nellie Esparza.

Q. Did you interview her?

A. I did.

Q. Okay.

You said you also looked over the scene, is that correct?

A. Briefly, yes, sir.

Q. And at a later time did you also look it over again?

A. I did.

Q. Did you ever look for some bullet holes in the building?

A. We did. I say "we," I mean, Mr. Mongia, Jr. and myself.

[103] Q. Did you ever find any bullet holes?

A. No.

Q. Can you describe the inside of the bar?

A. Well, it's an older type building. They have some booths in the front area of the bar. There's a regular bar counter, pool tables.

There's a room in the back where they store beer and then there's a small office, men and lady's restroom, and that's basically it.

Q. You said you looked for some bullet holes and you didn't find any; is that correct?

A. Correct.

Q. You saying there weren't any bullet holes in the bar then?

A. I'm not saying there weren't any. It was hard for us to tell. It was an old building that has quite a few cracks and holes in the walls so it's hard for me to say one way or the other.

Q. You did look it over and didn't find any?

A. That's correct.

Q. What steps did you take to investigate this in the following days, days following the robbery?

[104] A. Well, I spoke to different investigating officers. I followed up on the investigation as a standard procedure. Spoke with informants. I spoke with people on the street. I went back to the scene, spoke with the victim's family.

Q. Did you ever get anywhere as far as any suspect following the robbery, say, for the first few months following the robbery?

A. Well, a suspect was first brought to my attention approximately shortly after the murder.

Q. Who would that be?

A. I had contact with one of the suspects on the—I believe it was the 11th of October, '74, two days after the murder and that was Manny Soto.

Q. Why did you get in touch with him?

A. Because I was told by an informant he was involved in the La Conga Bar case.

MR. EDWARDS: Objection, hearsay, Your Honor.

THE COURT: Sustained and I'll strike the witness's answer and the jury is to disregard the answer.

Q. (By Mr. Lingeman) Did you contact [105] anyone else who you later learned to be involved in the robbery?

A. Yes, on I believe it was the 11th of September '75. Kevin Reed.

Q. Okay.

That was when?

A. I believe it was the 11th of September of '75.

Q. Okay.

Now, how did you happen to come into contact with Mr. Reed?

A. I was contacted at the Detective Division I believe it was by Mr. Harold Higgins of the County Attorney's Division.

Q. What was that in reference to?

MR. EDWARDS: Objection, Your Honor, hearsay.

THE COURT: Sustained.

Q. (By Mr. Lingeman) Well, you got in touch with Mr. Kevin Reed, Cleveland Reed?

A. I subsequently did, Yes.

Q. Sometime in '75?

A. That's correct.

Q. Do you remember the exact month—are you sure about the exact month or date or are you just giving me your estimate or what?

[106] A. Pretty sure it was the 11th of September '75.

Q. Okay.

Now, did you have a conversation with Mr. Reed?

A. I did.

Q. Did Mr. Reed—what had Mr. Reed been apprehended for?

A. He was being held on unrelated charges, one of which I believe was grand theft. I don't recall what the other charges were.

Q. Okay, charges not as serious as these we're talking about with the La Conga Bar robbery?

A. If we're talking about murder I would have to say no.

Q. What did Mr. Reed indicate to you when you talked to him?

A. He stated that he was one of the five people involved in the La Conga incident. He named the other four persons involved.

Q. Well, prior to the time that he gave you this information did he indicate to you that he had some information about the La Conga Bar robbery, that he wanted to deal or anything like that?

MR. EDWARDS: Objection, leading and [107] hearsay.

THE COURT: Overruled. You may answer the question.

THE WITNESS: I didn't have—

THE COURT: Yes or no—do you remember the question?

THE WITNESS: No, sir.

Q. (By Mr. Lingeman) Okay.

I want to get the initial conversations that were had with—before any details about the La Conga Bar robbery, was there a deal made with him to get him to give you information?

A. There was through the County Attorney's Office.

Q. Okay.

Was it your understanding that he was going to have immunity for any of the charges that arose out of the La Conga Bar robbery?

MR. EDWARDS: Objection, leading.

THE COURT: Overruled.

THE WITNESS: Yes, that was my understanding.

Q. (By Mr. Lingeman) Okay.

After this deal was made did he relate—give to you information regarding the La Conga Bar?

[108] A. He did.

Q. What was that information?

MR. EDWARDS: Objection, hearsay.

THE COURT: Sustained.

Q. (By Mr. Lingeman) Well, he gave you some names; is that correct—I don't want to know what the names were, just want to know if he gave you some names?

A. Yes, he did.

Q. Did you contact some people after he gave you those names?

A. Yes.

Q. Okay.

Ultimately some months later were some arrests made after he gave you those names?

A. Yes.

Q. Was Mr. Edwards also known as Mr. Barefield, Willie Barefield, one of the people who was arrested?

A. Yes.

Q. Okay.

Were you present at the time of the arrest?

A. Mr. Barefield's arrest?

Q. Yes.

A. No, sir. I wasn't.

[109] Q. When was this arrest affected, if you know?

A. I believe he was arrested on the 19th of January of '76.

Q. Okay.

Did you have occasion to speak with him on that particular day?

A. Not on that day. My first contact with Mr. Barefield was on the 20th of January of '76.

Q. Who else was present when you had that contact with him?

A. Detective Milne.

Q. Where did it take place?

A. Pima County Sheriff's Department.

Q. What transpired?

A. Well, Detective Milne and I contacted him at the jail and in one of the attorney's booths as they're commonly referred to.

Prior to any conversation with Mr. Barefield I advised him of his constitutional rights verbatim from the department's standard issued rights card.

He replied in an affirmative manner that he understood his rights and would answer my questions.

[110] He asked me to play part of Manny's—Manny Soto's statement. I proceeded—I did in fact play the tape. I played approximately nine, no more than twelve minutes of the tape.

He then told Detective Milne and myself that he would talk to us, tell us what happened, but he wouldn't give us a taped statement.

Then I mentioned the statement something to the effect: Well, Milne and I could testify to it, we're both here, and

he just said that he didn't want it on tape so we said no and we agreed we wouldn't record it, and then he told us what his part in the crime was.

Q. What did he tell you?

A. He told us that approximately three or four days before the incident which occurred on the 9th of October of '74 that he had gone over to Manny Soto's house and that Kevin Reed and Manny Soto were talking about pulling this robbery off. It was at that time that he decided to go along with them.

On the 9th of October they went to the area of the La Conga. I say "they," the other four subjects.

They staked out the bar. When the two victims, Mr. Mongia and Mrs. Esparza walked [111] out of the bar Mr. Barefield and Kevin Reed approached both of them and they were forced back into the bar at gunpoint.

According to Mr. Barefield Kevin Reed was the only one that had a gun.

The two victims were taken back inside the bar and Mr. Barefield stated he did not hurt Nellie or rob her, take her money, and sometime shortly thereafter he heard two or three gunshots from Kevin Reed's gun, and he said something to the effect that the gun went off because it had a hair trigger on it.

Shortly thereafter Mr. Barefield took Nellie Esparza into the back room where Kevin Reed had Mr. Mongia.

As they, Mr. Barefield and Mrs. Esparza went into the back room, Mr. Mongia was sitting on the chair bent over opening the safe and being held at gunpoint by Kevin Reed.

They took—a wallet was taken, the victim's ring, and money box, and I believe two money bags, and shortly thereafter they ran from the scene and then I asked him questions about which way they ran and he proceeded to tell me.

Q. Tell us exactly what he told you to the best of your recollection?

[112] A. He said they had run out of the bar east on Williams across Anita Street through a ball park.

I say through a ball park, at the present time I don't know whether they went to the center of the ball park or went around, and they kept running. They ran south on Main, east on Second, and they broke up somewhere in the area of John Springs School, Junior High.

Q. Did he say where they went after they broke up?

A. I believe he did.

Q. Do you recall?

A. I believe he said he went home to his house. I believe he said he was living at Queen and University.

Q. Did he indicate to you whether he had ever met up with the rest of the individuals that were involved in this or not, if you recall?

A. I don't recall at the present time.

Q. Do you have a supplement on this that would cover this statement that was made to you by Mr. Barefield?

A. Yes, I do.

Q. Do you have that with you?

A. I don't have it with me, no.

[113] Q. Where would it be?

A. Well, I've got one in my file, one in police records, and I believe you have a copy of it.

Q. Where is your file?

A. Up in your office.

Q. Would that help you refresh your recollection on this aspect of the statements that were made to you?

A. Yes, if we're going to go into further detail.

Q. Okay.

I don't know that this has been marked or not as an exhibit.

THE CLERK. No.

MR. LINGEMAN: Just a second, Your Honor.

THE COURT: Certainly.

Q. (By Mr. Lingeman) Let me ask you this: After the verbal statement to you, right after the interview did you do anything to record this—I know you had agreed not to record the actual conversation, but did you do anything to help you refresh your recollection such as either recording it, your recollection of it, or writing notes about your recollection of it or anything like that?

[114] A. I did.

Q. What did you do?

A. We first got out of the County Jail and Detective Milne and I got in our police vehicle and I talked into the tape recorder.

Q. Made verbal your recollections immediately of that?

A. That's correct.

Q. Did you later record or in some way get in—get into a supplementary report, this conversation?

A. I did. Later on what I did is I took the tape recording that I had of the details and then wrote it out and then I called in a supplement at a later time.

Q. Okay.

Is State's 5 that's been marked for identification and placed in front of you there, is that a copy of your supplement?

A. It is, but it's not complete. There is a page missing.

Q. Okay.

A. I believe it's the first page.

Q. Is the portion in there that deals with the statements—is this the first page?

A. It is.

[115] Q. Okay.

Could you find the part that deals with the statements in your report?

A. Yes, it's on page 6 of my supplement.

Q. If you reviewed that would it refresh your recollection as to more details about the statements?

A. Yes.

Q. Why don't you go ahead and do that?

A. Okay.

Okay, I have read it.

Q. Does it refresh your recollection as to anything else you haven't told us so far?

A. Well, one thing, yes—about the fact that one of the suspects in the case had gone up to the window of the bar.

Q. He indicated that to you?

A. Yes.

Q. Which suspect that he told you?

A. Manny Soto.

Q. Did he name all of the people that were involved in there?

A. He did.

Q. What names did he give you?

A. Manny Soto. He said Manny also goes by Boy.

[116] Q. This was the person whose tape you already played for him and who had given this statement to you that had to be recorded earlier?

A. That's right.

Q. Who else?

A. Albert Williams, Willie Leroy Williams, and Kevin Reed or Cleveland Reed. He goes by both names.

Q. Okay.

A. Also that Manny pulled the burglary there at the La Conga at one time, was familiar with the safe. Mr. Barefield also described the victim's ring to me.

Q. The ring?

A. That's correct.

Q. Did he indicate to you that a ring was taken from the victim?

A. Yes. That's basically it.

Q. Anything more about where Mr. Barefield went after the robbery was committed?

A. I don't believe so.

Q. What you told us earlier was your best recollection of what he indicated?

A. At the present time, yes.

Q. Okay.

Is that pretty much all the statements [117] as you recall them that he made to you there at the conversation at the County Jail?

A. Later on he asked us to contact him. He wanted to talk to us again after we talked to Willie Williams.

Q. When was this?

A. Sometime during the interview we had with him at the County Jail.

Q. He asked you to contact him again?

A. That's correct.

Q. Go ahead.

A. What it was is we were at the County Jail interviewing Mr. Barefield at which time we were notified that Mr. Williams had been taken into custody, Willie Leroy Williams, and Mr. Barefield asked us what Williams had said, something to that effect.

We told him we didn't know because he had just been arrested. I remember Milne going out of the room and coming back in, and he made some statement that he'd like to talk to us later on.

Q. After you talked to Mr. Williams?

A. Yes.

Q. Did you ever get back together with Mr. Barefield?

[118] A. Yes.

Q. When?

A. I don't recall the exact date. It was several days later.

Q. What took place at that time?

A. He asked us what Willie Williams had said. We asked him again if he would give us a statement. He refused again.

Q. On tape you mean?

A. On tape, yes. It was a very short conversation.

That's basically all I recall at the present time.

Q. Okay.

Up to the time when Mr. Reed was apprehended on those other charges that you have indicated which was some time in '75, did you have further leads in your case or was your case on the La Conga Bar pretty much at a dead end?

MR. BROGNA: Objection, Your Honor, immaterial.

THE COURT: Sustained.

Q. (By Mr. Lingeman) Well, what were you doing on this investigation just prior to the time that you came into contact with Mr. Reed?

A. Nothing much really. We pretty much [119] well exhausted all possible leads.

MR. LINGEMAN: That's all I have.

CROSS-EXAMINATION

BY MR. EDWARDS:

Q. State your name for the record.

A. Victor C. Marmion.

Q. Detective Marmion, do you know when I was arrested?

A. I wasn't present. I do believe I know, yes: January 19th.

Q. Did I talk to you January 19th?

A. No, I don't believe so. I saw you in the Detective Division, but I didn't talk to you.

Q. You know I had talked to Detective Bunting here, don't you?

A. I was aware of it, yes.

Q. Did you read the so-called statement, tape recorder statement I made?

A. Later on.

Q. Did you read it before you come to see me?

A. No, I didn't.

Q. You didn't read it?

A. No, I didn't.

Q. Detective Marmion, you stated that you [120] came out to the jail, that I asked to see you, that's the 20th?

A. No, sir. I didn't say that. What I said was Detective Marmion and I contacted you on the 28th. We subsequently contacted you at a later time after the 28th.

Q. Did I ask you to contact me?

A. Yes, you said you wanted to talk to Milne and myself.

Q. Didn't I say when you first came to me, see, I supposedly made this statement, did you contact me?

A. The first time on the 28th, no. I went there on my own accord.

Q. You said I stated to you that me and Reed had a gun and I stated to you that that—then he ran on the ball field after this happened—is this all in my report that you stated?

A. What I have stated is that you said Mr. Reed had a gun. I didn't say that you had a gun.

Q. Well,—what I also indicated as far as the ball field is that at the present time I don't recall if you indicated to me whether you went through the ball park or around the ball park.

[121] Q. Is this in your report there?

A. What is that?

Q. This statement I supposedly made to you, verbal statement?

A. I believe it.

MR. EDWARDS: I'd like to make this an exhibit.

THE CLERK: E.

THE COURT: Exhibit E.

Q. (By Mr. Edwards) Show me, Detective Marmion,

where I ran out after I did the crime in that statement there?

A. I beg your pardon—repeat the question.

Q. Would you read it where I ran after through the ball park and then I ran to my house?

A. I don't see— I don't see ball park in particular, but I do see the direction of travel that the suspect took according to Mr. Barefield was consistent with that Reed had previously told me. I recall you telling me about the ball park.

That's where I covered that as far as the gun—here we go, you indicated to me that Reed was the only one carrying the gun. It's—yes, it's in my report.

[122] Q. Who made that report?

A. I did.

Q. You wrote that report out yourself?

A. I didn't write it. I called it in on a tape recording and then the girls type it up.

Q. Okay.

A. Then it comes back to me and I check it.

Q. Is it signed by me?

A. By you?

A. Right.

Q. No. It's not.

Q. Mr. Marion, when you came out there you said that you never read no—did you have any indication of talking—to talking to a lawyer Poles and Higgins?

A. I don't understand the question.

Q. I'll ask you again.

You had the interview you made with a—my previous attorney Poles and Tom Higgins, do you remember that a—that statement you gave to them?

A. I remember I had a conversation with the gentlemen.

Q. You don't remember the statement, though?

A. Do I remember the statement?

[123] Q. Yes.

A. Yes, I remember giving them a statement, yes.

Q. You don't remember—you don't remember like I asked you before ever reading my statement before you came out to see me, you never did that?

A. I don't recall reading your statement, no.

THE COURT: Exhibit F.

Q. (By Mr. Edwards) That might refresh your memory, Mr. Marmion.

A. What is it you want me to read?

Q. So you can—you say you don't recollect—refresh your memory the statement you made, Detective Marmion?

A. What in particular?

Q. Referring to you don't—you didn't read my statement I made to Bunting before you came out and contacted me, come out there to contact me to make another statement?

MR. LINGEMAN: Could we have a page or line number—that's fairly lengthy.

THE COURT: You have a page or line?

MR. EDWARDS: Yes, I'll do that. Page three.

[124] THE WITNESS: It's okay. What is your question.

Q. (By Mr. Edwards) I just asked now—I ask you again: Do—did you ever come in contact with Bunting before you came out and looked over the statement, you didn't read it, but you looked over it, you know I had made a statement before you came out?

A. As I stated, I don't recall at the present time. I don't remember.

Q. But you don't remember saying that?

A. No, I don't.

Q. Number three, line three:

"Detective: Uh, no, I just briefly, very briefly read over the statement that he gave the two Buntings.

"Tom: Okay. So it was already transcribed?

"Det.: Yes, right.

"Tom: Okay, before you had any personal contact with him?

"Det.: Right, that, I didn't read his statement till later on.

"Tom: Oh, I see."

That was you saying that, that was you, Detective Marmion?

[125] A. I'm telling you I don't remember.

Q. You don't remember.

A. I don't remember making that statement. I don't remember answering that.

Q. How do you remember, then, that statement you made—said I made to you if you don't remember making this?

A. You just confessed to murder and robbery. It sticks in my mind. I don't forget major facts like that. I have testified numerous times in this trial and I figure I might forget little things, but I won't forget the major things.

Q. You forget little things that you say in other statements, but then you don't forget you making up another statement and putting it on tape, and then you saying I didn't even ask to see you, then you trying to say that you came down, didn't know that I had talked to Sgt. Bunting, yet; is that right?

A. I believe you're making a statement. I don't know if you're asking me a question.

Q. I'm asking you, Sargeant Detective Marmion, that you transcribed that statement; am I correct?

A. No, I didn't. I never told you that.

Q. You wrote that statement out yourself?

[126] A. I never wrote it, never wrote any statement. I made my police report, my supplement, but I had nothing to do with Sgt. Bunting's statement.

Q. You didn't know about Sgt. Bunting's statement when you come out to talk to me?

A. I know that Bunting had talked to you, yes, but I indicated I don't remember at the present time making the statement.

Q. You don't remember a lot of things, Sargeant—

MR. LINGEMAN: Objection, argumentative.

THE COURT: Sustained.

Q. (By Mr. Edwards) Sgt. Detective Marmion, when you came out on the 20th did your sargeant send you out there to talk to me?

A. No, sir, he did not.

Q. At any time Sgt. Bunting ask you to come see me?

A. No, I was the chief investigator in the case. It was my case.

Q. You came out to there—out there to talk to me?

A. That's correct. I went out there on my own.

Q. So then you—I was—then how did I approach to the attorney, I know that he was [127] there, and then he just ran to see that you was there to come where I was at.

Q. We were in the attorney booth and you walked in?

That's when I made the statement to you that—that statement you got right there.

A. After I advised you of your rights, yes.

Q. Right.

You didn't play another statement, you say I wanted you to play another statement?

A. No. I stated that you asked me to play Manny Soto's statement. You never asked me to play another statement.

Q. How long did you play Manny Soto's statement?

A. Approximately nine, no more than 12 minutes.

Q. Then you—then that's when I gave the verbal statement?

A. You eventually did, yes.

Q. That's when you said to me that you noticed me, and the other detective standing here—anything you say can be held and used against you?

A. Yes.

[128] Q. But I still gave you a verbal statement knowing that it could be used against me?

A. Yes.

Q. Did you know where I was in the jail, Sgt. Marmion?

A. No.

Q. I know you had to know where I was.

A. I can only say you were in Pima County Jail.

Q. You don't know that since the—after Bunting took me out I had made—gave them my story, then I didn't ask you all to come see me then you know I was put in solitary and I was pulled out of solitary to come see you.

MR. LINGEMAN: Objection, these facts are not in evidence.

THE COURT: Sustained.

Q. (By Mr. Edwards) So then you came down there to see me; am I correct?

A. I have went down there to see you on my own accompanied by Detective Milne.

Q. Nobody asked you to come see me?

A. No one asked me.

Q. Did I ask you to come see me?

A. No, you didn't, not then.

Q. Do you remember what time of morning [129] that was?

A. I do.

Q. Could you tell the Court what time?

A. Approximately 9:15.

Q. Do you know what time do people go to arraignments and see lawyers?

A. I do.

Q. What time was that?

A. Approximately 1:30.

Q. Do you have a morning court or afternoon court for arraignments?

A. To my knowledge initial appearances are approximately 1:30 every day.

Q. I mean arraignments, not initial appearance.

A. I don't know.

Q. You came down there about 9:30 to come see me; am I correct?

A. No, sir.

I stated I had contacted you approximately 9:15.

Q. Then I come in with you in a booth to talk to you, I come to talk to you and another police officer, is that what you're saying?

A. That's correct.

Q. Is that in your supplement, Sgt. Marmion?

[130] A. We contacted you.

Q. No, that you—that you come out to talk to me and I was ready to talk to you, is that in your supplement?

A. I indicated in my supplement that we contacted you on the 20th at 9:15 and you did talk to us.

Q. Did you take notes when I was giving a verbal statement?

A. No, I don't believe I did.

Q. You didn't know—you didn't take notes?

A. No, I didn't.

Q. You remembered it in your head and then wrote it down on a piece of paper?

A. No, what I indicated was that I didn't take notes. I put it in the tape recorder and then transferred it onto my notes, and then called my supplement in and then checked my supplement.

Q. Is that your supplement there?

A. It is.

Q. This here?

A. This one here, that's a page of my supplement, but this isn't the complete one.

Q. But this is your supplement that you made?

[131] A. That's a page of my supplement, yes.

Q. Now, you don't remember when you made this statement to Poles and Tom Higgins, you don't remember talking to them; am I correct?

A. Yes, I do remember talking to them. I have stated I did, yes.

Q. You have said that you told them the same thing that you was telling, you was telling the court, you told them the same thing you—that you testifying today here?

A. No, I never made that statement, no.

Q. But you told them basically what I talked to you and mostly you told them the truth, didn't you, Sgt. Bunting—Sgt. Detective Marmion?

A. When I spoke with Mr. Poles and the other gentlemen I have spoken the truth throughout the case.

Q. No, I'm talking about when you were talking to attorneys at law you was telling the truth; am I correct?

A. You bet I was telling the truth.

Q. When you do not remember—I must get you to remember this statement, Detective Marmion, mostly that you made how you got in contact with me, how you then come to the jail, how you down here you told them how I made a statement to you.

[132] MR. LINGEMAN: Object to Mr. Edwards' reading from the statement. If he wants it in evidence, he can put it in evidence but—or ask questions. He's reading parts and missing parts.

THE COURT: I'm not sure.

Would you give me the question so far, please, Mr. Sipes, and everybody be quiet.

(The Reporter read back.)

THE COURT: Overruled. You may finish—

MR. EDWARDS: I'll start over.

Q. (By Mr. Edwards) Like I was saying, Det. Marmion, mostly this statement it was that you was, you know, that you told the truth to the same things mostly you testifying because my attorneys asked you about mostly me when you come to contact me, told me when you did come to the jailhouse and things like that, do you remember them questions or no?

A. If I understand your question right, I have indicated that I did talk to your attorneys. I did make a statement.

Now, that particular section that you refer to is what I'm saying that I don't remember, but I did make a statement to your attorneys. I did talk to them, yes. I never said I didn't.

Q. At any time, Detective, Tom Higgins state down here you don't think I was telling the truth

[133] Would you give me the question so far, please, Mr. Sipes, and everybody be quiet.

(The reporter read back.)

THE COURT: Overruled. You may finish your question—or you can start over again.

MR. EDWARDS: I'll start over.

THE COURT: Okay.

BY MR. EDWARDS:

Q. Like I was saying, Detective Marmion, mostly this statement it was that you was, you know, that you told the truth to the same things mostly you testifying because my attorneys asked you about mostly me when you come to contact me, told me when you did come to the jailhouse and things like that, do you remember them questions or no, Detective Marmion?

A. If I understand your question right, I have indicated that I did talk to your attorneys. I did make a statement.

Now, that particular section that you refer to is what

I'm saying that I don't remember, but I did make a statement to your attorneys. I did talk to them, yes.

I never said I didn't.

Q. At any time, Detective, Tom Higgins state down here you don't think I was telling the truth [134] with the statement you got to me?

MR. LINGEMAN: Objection, page and line.

THE COURT: All right. Sustained.

Furnish that information to Mr. Lingeman.

MR. LINGEMAN: Objection, Your Honor, unless he reads—

THE COURT: Just a minute. Don't argue it in front of the jury.

I'll have to see it in order to rule on the objection.

Is it the portion that you have the lead pencil by here?

MR. EDWARDS: What?

THE COURT: Is it the part that you have got the lead pencil?

MR. EDWARDS: I was trying to, yeah, circle around from the top. It was up on most of the top all the way down.

THE COURT: Do you object to this?

MR. LINGEMAN: Yes.

THE COURT: Sustained. It doesn't appear to be inconsistent.

MR. EDWARDS: Right here, Detective,—it says this.

THE COURT: Continue question by Mr.

(CAPTION OMITTED)
PROCEEDINGS APRIL 22, 1977

A-30683

[3-120]

CHARLES MILNE,

was thereupon called as a witness in behalf of the State, and being first duly sworn, was examined and testified as follows:

THE COURT: The witnesses in this case are under the rule, Detective, so you can't be in the courtroom except when you are testifying.

In addition, you can't discuss your testimony with anyone other than the attorneys until the case is finished. Thank you.

DIRECT EXAMINATION

BY MR. LINGEMAN:

Q. Please state your name.

A. Charles Milne.

Q. And your occupation?

A. Detective, Tucson Police Department.

Q. How long have you been so employed?

A. Ten years.

Q. Have you ever been in the Homicide Detail?

A. Yes, I have.

Q. When was that?

A. September '75 through September of '76.

[3-121] Q. Okay. During that year at sometime did you have occasion to be involved in the investigation of the La Conga Bar robbery?

A. Yes, I was.

Q. Did you accompany Detective Marmion on—in January of 1976 to the Pima County Jail and there witness a conversation with Robert Edwards, also known as Willie Barefield?

A. Yes, I did.

Q. Do you see that person in the courtroom?

A. Yes.

Q. Would you point him out, please.

A. The gentleman sitting at the defense table in the blue shirt to the right of Mr. Brogna.

Q. How did it happen you went along with Detective Marmion?

A. Detective Marmion was going out to interview Mr. Barefield and I accompanied him. I was in the detail a short period of time at that point. It was as well as an educational process for myself.

Q. Were you that familiar with the details of the La Conga Bar robbery or not?

A. Not as familiar as if it had been my case to begin with. I was aware of some of the circumstances that happened, but not fully aware [3–122] of the entire investigation, no.

Q. Do you remember what took place at the Pima County Jail?

A. Detective Marmion interviewed Mr. Edwards.

Q. Okay. What was the first thing that happened when Mr. Edwards came in the room?

A. Detective Marmion advised Mr. Edwards of his rights.

Q. And did Mr. Edwards indicate he understood his rights?

A. Yes, he did.

Q. Did he indicate he would talk with you?

A. Yes, he did.

Q. What was done then?

A. Mr. Edwards indicated he would talk to Detective Marmion, but first he wanted to hear a tape that was produced by Mr. Soto, who was also involved in this incident.

Q. Was the tape played for Mr. Edwards?

A. Yes.

Q. The whole tape or part of it?

A. I'd say approximately ten minutes or so.

Q. Then what happened?

A. Detective Marmion asked Mr. Edwards [3–123] if he would give a taped statement concerning his involvement in the incident under investigation.

He indicated he did not want to give a taped statement due to the fact that it could be used against him in court, but he would verbally tell us what we wanted to know.

He was instructed at that point by Detective Marmion that anything he said to us would be used in court even though it wasn't on tape.

Mr. Edwards indicated that he understood that, but he would—just did not want his voice put on tape.

Q. Was a conversation then had reference the La Conga Bar robbery-murder?

A. Yes.

Q. Can you tell me, to the best of your recollection, what Mr. Edwards told you about his involvement in the crime?

A. Mr. Edwards indicated to Detective Marmion and I that he had been at Manny Soto's house two or three days prior to the robbery at the LaConga Bar. A Mr. Reed and Mr. Soto were discussing pulling the robbery at the bar at which time he decided to go along.

The night of the robbery he, Mr. [3–124] Reed, Mr. Soto and the Williams brothers went to the LaConga Bar.

Mr. Soto had looked in one of the windows of the tavern to see where Mr. Mungia and Nellie Esparza were located when the bar closed and those two people attempted to exit the bar. They were confronted by Mr. Edwards and Mr. Reed.

Mr. Reed, according to Mr. Edwards, was the only one that had a weapon.

And they were forced back inside the tavern.

The other three individuals acted as lookouts, according to him.

Once inside the tavern, Mr. Reed forced Mr. Mungia to the rear or office portion of the tavern and a short time later he proceeded—or this being Mr. Edwards—proceeded to take Miss Esparza back into the same office.

Once inside the office area, according to Mr. Edwards, Mr. Reed was advising Mr. Mungia, or threatening Mr. Mungia to open the—open the safe, which they knew was in the office due to Manny Soto had completed a burglary at that location on an earlier occasion.

And I believe a money bag or box was taken out of the safe as well as the personal [3–125] effects from Mr. Mungia, this being a ring and a wallet but I'm not sure if there was a watch involved or not.

Mr. Edwards indicated that once they got these items from Mr. Mungia they split out the front door and started to run.

Q. Did he say anything about what happened after they left the business?

A. They caught up to the other three individuals that were outside, this being the Williams brothers and Mr. Soto, and then all ran to their respective residences.

Q. Is that pretty much the conversation you recall this man making in your presence and in the presence of Detective Marmion?

A. Yes, it is.

MR. LINGEMAN: That's all the questions I have.

THE COURT: Cross-examine.

MR. EDWARDS: Do you have the statement and exhibit?

CROSS-EXAMINATION

BY MR. EDWARDS:

Q. Will that refresh your memory, Mr. Milne?

[3–126] A. Pardon?

Q. Will that refresh your remembering? You said I stated in the part about the wallet and other types jewelry

and then I ran out and we caught up with the people and then I ran to my residence.

Did I say that in the report, Mr.—

MR. LINGEMAN: Could we have some clarification as to whose report this is.

THE COURT: Yes.

Q. (By Mr. Edwards) Does it say this in the report?

THE COURT: I sustained the objection because we don't know whose report it is.

Q. (By Mr. Edwards) Where is your report, Mr. Milne?

A. I did not make a report reference the conversation you had with Detective Marmion.

Q. So you didn't take no report.

A. No, sir. Detective Marmion did that.

MR. EDWARDS: I mark this an exhibit.

(Whereupon, Defendant's Exhibit L, a Police Report, is marked for identification.)

Q. (By Mr. Edwards) I show you the report of what you said on the stand, Mr. Detective. That's your report there?

[3-127] A. Yes, this is.

Q. Does it have the same thing you testified on the stand?

A. As I said before, Mr. Edwards, I did not make a report of the conversation Detective Marmion had with you. Detective Marmion did that.

Q. Mr. Milne—

A. Yes.

Q. —Detective Milne, I don't see how could you interview me January 19 because January 19 Detective Bunting interviewed me.

A. I never said I interviewed you on January 19th.

MR. EDWARDS: Oh, yes. Your Honor, I would like the court reporter to go back to what Mr. Lingeman said on

January 19th that they went down to the County Jail and he testified I did. I think it was on the court reporter, back to Lingeman's cross-examination.

MR. LINGEMAN: Your Honor, maybe he is concerned because I said January 1976.

THE COURT: You want the court reporter to read a question back?

MR. EDWARDS: Yes, a question that Mr. Milne came out to the jail house on January 19, 1976, and he could not have interviewed me on [3–128] January 19th, 1976, because I was interviewed by the Buntings January 19th, 1976.

THE COURT: We can look for that during the recess.

MR. EDWARDS: I don't have no more questions until I get that.

THE COURT: Do you have any redirect?

MR. LINGEMAN: Not now, Your Honor.

THE COURT: Ladies and gentlemen, we'll recess at this time.

Keep in mind the admonitions that the Court has previously given to you.

(Whereupon, the jury retires at 2:45 p.m. and the following proceedings were had, to-wit:)

THE COURT: Mr. Lingeman, when we get back your objection to the question will be sustained.

MR. LINGEMAN: That means we are through with Mr. Milne?

THE COURT: You are through with Mr. Milne?

You're resting, then.

MR. LINGEMAN: Yes, Your Honor.

THE COURT: When the jury returns the State is going to rest, so I'll now hear anything you have at the time the State rests.

(CAPTION OMITTED)

PROCEEDING APRIL 25, 1977

A-30683

[4-117] LARRY BUNTING,

was thereupon called as a witness in behalf of the defendant and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EDWARDS:

Q. State your name for the record.

A. Larry Bunting.

[4-121] I think you was—you and I think Steve Bunting arrested me, am I correct?

A. That is correct.

Q. And you took me down to the police headquarters, am I correct?

A. That's correct.

Q. I made what you called a homicide alibi statement, am I correct?

A. I wouldn't just call it a homicide.

It's what is considered an alibi statement.

As you phrased it, you wanted to make an alibi statement.

Q. Did I make an alibi statement voluntary?

A. Yes.

Q. And I guess you take that alibi statement taped; is that correct?

A. Correct. As you'll remember I played it here the other day in the jury.

Q. When you arrested me, Sgt. Bunting, did you have the address where you arrested me from?

A. I did at the time. I believe it was [4-122] 1022 East Twenty-Fourth. I'm not sure of the exact address, but I believe that was it.

Q. Do you know who was living there?

A. At the time?

Q. Yes.

A. Not for certain I did not know at that time.

Q. And you mean you come to arrest a person and you did not know who lived there, Sgt. Bunting?

A. I was not certain that you would be there until I found you there.

Q. So if you—who did you know lived there, if you knew that you would probably find me there, Sgt. Bunting?

A. The information was that it was Willie Williams' sister lived there and there was a possibility that you would be there with her.

Q. So you knew that I was staying with Mrs. Williams, is that correct, is that what you're telling me?

A. No, I didn't say that. I knew you were staying there with her. The information was that you would probably be there.

Q. But you knew she was staying there.

A. No, I did not know that at that time because all possibilities—it was the information [4–123] that she was staying there.

Q. Dr.—Sgt. Bunting, when I gave you what we call alibi statement, and you said after I gave you alibi statement that then—I have a question before alibi statement.

Now, when I came to the interrogation part, at anytime did you play a statement, I think it was Reed's or the statement to me?

A. Yes, part of it was related to you.

Q. And you said a person involved in a crime, am I correct?

A. As I stated previously, Kevin Reed and Soto had previously given statements implicating you and you were apprised of this fact and you stated that you had an alibi and wanted to make an alibi statement.

Q. When you told me that Reed had—had implicated my name, and I told you I would make a statement and tell you what I know; is that correct?

A. That is correct.

Q. And I made that statement voluntary.

A. That is correct.

Q. And after I talked to you, after the statement was over, then you testified that I asked for a lawyer to make a deal, am I correct?

[4–124] A. Not in those words.

You asked to make a deal. You asked to make—

Q. No, I didn't ask—

A. —contact with the county attorney.

Q. You have to answer questions and I asked—

MR. LINGEMAN: Your Honor—

Q. (By Mr. Edwards) Did I ask to make?

THE COURT: Let him finish his answer.

THE WITNESS: When no deal was made, you left with the idea that you were going to get an attorney to make a deal for you, which I considered to be different from you wanting an attorney at that point to make a deal for you.

Q. (By Mr. Edwards) Now, Mr. Bunting, when I said I was going to—you—you stated that I said—do you have that on the tape recorder, Mr. Bunting?

A. No.

Q. I know you have. Do you have it—you had whatever I told—when you interrogated me you had that on tape statement.

A. You heard your statement and that's the only thing that was on tape.

Q. You're not answering my question, Sgt. [4–125] Bunting.

I'm asking did you have that on tape?

A. Your statement is on tape. Our conversation about the deal and back and forth general conversation is not on tape.

Q. So anytime what you saying that our conversation led to, so anytime I said to myself that I know that I'm—I'm involved in this crime and my involvement, did I tell you my involvement in the crime? How long did we talk, Sgt. Bunting?

A. Our total time together was approximately three hours.

Q. Okay.

A. Then part of your question was what did you say to yourself? I missed the first part of your question.

Q. I asked you what you testified before Sgt. Bunting.

At anytime did I tell you in the three hours that we talked that I was involved in the crime at the LaConga Bar?

A. Not directly.

Q. I can't ask you—I can't—what you mean not directly?

Sgt. Bunting, I want you to say yes [4–126] or no. If you know that I was involved, tell me my participation, tell the Court was I involved or was I not involved, that's the question I'm asking.

A. I can best answer that by stating that you indicated you had information, knowledge, but you did not relate the exact information or knowledge. You wanted a deal first.

Q. You still ain't answering my question, Sgt. Bunting.

I'm asking you is—do you have that in your taped statement that you're talking about?

A. No. As I said previously this was conversation that came about after your taped statement.

Q. Then did I tell you at anytime that I was involved in a crime?

A. Not directly.

Q. When I left did I tell you I was involved in any crime?

A. No, sir, not directly.

Q. I can't understand what you're saying Mr. Lingeman (sic), not directly. You misinformed the Court that answer you giving, Sgt. Bunting.

What—if you can tell the Court [4–127] what participation I told I was in and then you can say directly, not directly, but I can't understand, Mr. Bunting, you're misinforming the Court.

MR. LINGEMAN: Objection, Your Honor. Argumentative.

THE COURT: Sustained.

Q. (By Mr. Edwards) Did I tell you—I will answer a question like this and give you a answer like this.

Did I tell you my participation in any crime?

A. No.

Q. Crime?

A. No.

Q. Did I put myself there?

A. Did you put yourself there?

Q. Right.

A. No.

Q. Right. I told you I know who could tell you where I was, am I correct?

A. What time are we talking about?

Q. The same—the same day. We didn't talk no further. The same day I made my involvement in no crime, did I tell you who could cooperate with my story?

A. Your alibi?

[4–128] Q. Yes. Who did I state?

A. Willie Williams' sister. I don't recall her first name.

Q. You knew I was staying with her; is that correct?

A. I didn't know that until you told me and I didn't know that I would find you there until I found you there.

Q. When you found me there you knew that I was staying with Mrs. Williams.

A. At that particular moment you were there at Mrs. Williams' house.

Q. When I left and went down to interrogation I told you that she could testify—she could tell you where I was and I left. You knew where she was; is that correct?

MR. LINGEMAN: Objection.

MR. EDWARDS: You wouldn't—

MR. LINGEMAN: I'm sorry. I thought he had finished the question.

THE COURT: Finish the question.

Q. (By Mr. Edwards) I saw you knew where she was where you could go and find out. Where you go. There wasn't nothing you had to go search.

A. That's absolutely correct.

Q. You could go right then and find out.

[4-129] A. Yes, I could have.

Q. Did you go and find out?

A. No.

Q. Now, after I left, Mr. Bunting, to the jail house, did you come in contact with me again?

A. No, I didn't.

Q. I have one more question for you, Sgt. Bunting.

You stated to the Court that anytime when I asked for a lawyer, referring to the lawyer to make a deal which you say, did you stop questioning me, Sgt. Bunting? Did I leave from there?

A. You never requested an attorney present at the interview. You wanted to talk to the county attorney, which you did.

I remember the county attorney's office. When no deal was made, you left stating, "I'm going to wait until I get an attorney to make a deal for me. I'm not going to make a deal now. I'm not going to make a statement now. I'm going to wait until I get my attorney."

That's the way it was left. That's all the discussion we had about it.

Q. I didn't ask you—I think you are still

misleading—did I ask for a attorney to [4-130] make a deal did you stop questioning me?

A. No, because the only attorney you asked for was the county attorney and you never requested an attorney for yourself.

Q. Is this your report, Sgt. Bunting?

A. Yes, it is.

Q. I must put that in evidence.

THE COURT: We'll have it marked as an exhibit.

(Whereupon, Defendant's Exhibit R is marked for identification.)

MR. EDWARDS: I must have it marked as evidence.

Q. (By Mr. Edwards) Sergeant, that's your report, Sgt. Bunting?

THE COURT: That's Exhibit R.

THE WITNESS: I have read the report.

Do you want me to read it to the jury or what's your desire?

Q. (By Mr. Edwards) What is your desire, Sgt. Bunting? I'm asking you about the deal.

THE COURT: Now, just a minute. He has read the report. Do you have a question?

MR. EDWARDS: Yes, I have a question of the attorney.

Q. (By Mr. Edwards) Don (sic) Polis [4-131] supposed to make a deal. I don't see now other question that he stated in his report, it was not in his report.

After I asked for a attorney to cause to make a deal, I was—I was sent quickly to the—back to the jail and the charge was murder and armed robbery.

MR. LINGEMAN: I'm going to object to this narrative of the defendant.

THE COURT: Sustained. You can read word for word from the report and ask him if that's in his report if you want to do it that way.

MR. EDWARDS: Yes. I would like to read it to the Court.

Q. (By Mr. Edwards) "The subject Barefield was read a portion of Calvin Reed's statement showing that Calvin Reed had implicated him. At one point Barefield stated he was going to make a statement and then he changed his mind and stated that without a deal he was not going to make a statement. He would wait for his attorney to make a deal.

"Then subject Barefield was transported to the County Jail on a warrant charging him with murder, armed robbery and armed burglary."

Now, Sgt. Bunting, you said that [4-132] after I had asked for attorney to make a deal in your words and then questioning continually, is that what you said?

A. It's not my interpretation of my report that you ever requested an attorney with the exception of the county attorney. You stated, "I'm going to wait until I get my attorney to make a deal for me," which is different than requesting an attorney at that point.

Q. If I request my attorney you think my attorney was the district attorney, is that what you say?

A. No. The only attorney that you requested to contact at that point that night, that evening, in your presence, was the county attorney.

And you indicated you would wait until you got your attorney to make a deal for you. That's my testimony and it's my interpretation of my report.

Q. That was your interpretation.

A. That's—that's what it says.

Q. Oh, your interpretation.

MR. LINGEMAN: Your Honor, I'm going to object. Argumentative.

THE COURT: Sustained. Sustained. Let's get on to another subject if you have anything [4-133] further.

Q. (By Mr. Edwards) I have two more questions to ask Sgt. Bunting.

So this was in your interpretation. Did you ever have your—all of this we talked to after I made my alibi statement, I know you all have a thing that when you talk you record.

Do you have that recorded statement?

A. I'm sorry, I don't understand what you're talking about.

Q. Let me make it more plain to you, then, Sergeant.

I know it's a duty to have everything recorded. I mean, that's the homicide thing and I want to know that you had that recorded about the attorney making a deal and so on and get an attorney to make a deal.

I know that everything is recorded. Do you have that recorded?

A. I think what you're talking about is what we call supplemental tapes where we dictate a supplemental record and it's typed from the tape onto paper by a stenographer. Those tapes are used over and over again and are not kept as are statement tapes.

Q. Oh, you have a—you have a recording [4-134] then, am I correct?

A. No, you're incorrect.

Q. Oh.

A. Those tapes that are used over and over again, continually.

Q. So when I left you, Sgt. Bunting, did I ask you again in questioning, did I ever tell you I was involved, did I ever tell you in my words that I was involved in any crime?

MR. LINGEMAN: Objection. Asked and answered.

THE COURT: Sustained.

MR. EDWARDS: Since I can't get any questions I got, I ain't got no more questions.

THE COURT: Mr. Lingeman.

MR. LINGEMAN: No questions, Your Honor.

THE COURT: You may be excused. Thank you.

(Witness excused.)

THE COURT: Would counsel approach the bench, please.

(Whereupon, a bench conference was had out of the hearing of the jury, to-wit:)

THE COURT: Does the defendant have any other witnesses?

MR. BROGNA: Not today.

Supreme Court of the United States

No. 79-5269

ROBERT EDWARDS, PETITIONER,

v.

ARIZONA

ORDER ALLOWING CERTIORARI. Filed May 19, 1980.

The petition herein for a writ of certiorari to the Supreme Court of the State of Arizona is granted limited to Question 1 presented by the petition.

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Supreme Court, U. S.
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No. 79-5269

IN THE

Supreme Court of the United States

October Term, 1979

ROBERT EDWARDS, *Petitioner,*

v.

THE STATE OF ARIZONA, *Respondent.*

On Writ Of Certiorari To The Arizona Supreme Court

SUPPLEMENTAL APPENDIX

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AUGUST 9, 1980

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(Caption Omitted)

Proceedings March 17, 18, 1977
A-30683

[1-44] CLEVELAND REED,

was thereupon called as a witness in behalf of the State, and being first duly sworn, was examined and testified as follows:

THE COURT: Mr. Reed, the witnesses in this case are all under a Rule that prohibits them from being in the courtroom at any time except when they are testifying.

In addition, you're not to discuss anything concerning this case or your testimony with anyone except the attorneys until the case is finished.

You may take the witness stand.

You may proceed.

MR. LINGEMAN: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. LINGEMAN:

Q. Would you state your name, please.

A. Cleveland Reed.

Q. Are you also known as Kevin Reed?

A. Yes.

Q. Where are your residing at this time?

A. Pima County Jail.

Q. Mr. Reed, did you participate in the [1-45] armed robbery of the La Conga Bar back in October of 1974?

A. Yes.

Q. Have you ever been convicted of any felonies?

A. Yes.

Q. What felony or felonies?

A. Grand theft, armed robbery, burglary.

Q. Okay. Were any of those convictions here in Pima County?

A. Grand theft.

Q. Okay. After the robbery in October of 1974, at sometime after that did you get in trouble for something else?

A. After the robbery?

Q. Yes.

A. Yes. I got in trouble for grand theft.

Q. Here in Pima County?

A. Here in Pima County.

Q. And were you arrested by some police officers sometime in late 1975?

A. Yes, I was.

Q. Would that be somewhere around September of 1975?

A. No. I believe it was in July or August of '75.

[1-46] Q. Okay. Do you remember giving a statement to the police about the robbery of the La Conga Bar?

A. Yes, sir.

Q. Around that time?

A. Yes, I remember.

Q. Was that at around the time that you were arrested on those other charges that you gave the statement?

A. Yes. I had been incarcerated three or four weeks before I gave the statement.

Q. Have you had a chance to take a look at that statement sometime before coming in here to testify?

A. Yes, I have.

Q. Did that help your recollection as to the date of the statement?

A. Yes.

Q. What was the date of that statement?

A. September 17th, '75.

Q. Okay. Prior to giving that statement about your involvement in the La Conga Bar robbery, did you make some kind of an agreement between yourself and the police and the County Attorney's Office that you wouldn't be prosecuted for anything that happened to arise out of the [1-47] La Conga?

A. Yes, sir. I was granted immunity.

MR. EDWARDS: Objection. The D.A. is leading the witness.

THE COURT: Well, the present record may stand. Proceed.

Q. (By Mr. Lingeman) Is the reason—what was the reason for making—for giving that statement, why did you give that statement about the La Conga Bar?

A. I gave the statement about the La Conga Bar for two reasons.

One was to hope for a lesser charge being brought against me for the robbery-murder.

And, also, I was hoping to get some of the charges that I was presently incarcerated for dropped.

Q. And were some of the charges you were presently incarcerated for dropped?

A. Yes, sir.

Q. What were you charged with initially at that time?

A. Grand theft, grand theft auto and arson third degree.

Q. You ended up getting a deal of just pleading to grand theft; is that right?

[1-48] A. Yes.

Q. I think you have already indicated that you were given immunity on anything that arose out of the La Conga Bar.

A. Yes.

Q. You have also been convicted of a crime of robbery back in Kansas.

A. Yes, I was convicted of armed robbery, possession of a firearm, failure to appear.

Q. That was back in Kansas?

A. Yes, sir.

Q. Are you currently under sentence in Kansas?

A. Yes, sir. I'm currently serving five to 99 and one to ten and a one to five all concurrent in Kansas.

Q. Three sentences and the largest is five to 99.

A. Yes, sir. The controlling sentence is five to 99.

Q. Will you be going back to Kansas when you complete your testimony here to finish the sentence in Kansas?

A. Yes, sir.

Q. You also have a sentence in Pima County.

A. Yes, sir.

[1-49] Q. What is that sentence?

A. Three to four, grand theft.

[1-160] LARRY BUNTING,

was thereupon called as a witness in behalf of the State, and being first duly sworn, was examined and testified as follows:

THE COURT: Sergeant, the witnesses in this case are under the Rule.

THE WITNESS: Yes.

THE COURT: And you'll have to leave the courtroom after you have finished testifying and you're not to discuss your testimony with anyone except the attorneys until the case is finished.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

BY MR. LINGEMAN:

Q. Please state your name and occupation for the Court.

A. Larry Bunting, Police Sergeant, City of Tucson.

Q. Are you in charge of any particular detail?

A. Yes, I am.

Q. What is that?

A. The Homicide Detail.

[1-161] Q. How long have you been acting in that capacity?

A. Since 1968.

Q. How long have you been a police officer?

A. Since 1960.

Q. Sgt. Bunting, did you have occasion to become involved in the investigation of the La Conga Bar murder-robbery back in October of 1974?

A. Yes, I did.

Q. Are you familiar with Detective Victor Marmion?

A. Yes, I am.

Q. Is he in your detail?

A. He was.

Q. Was he assigned that case?

A. He was.

Q. Did you also take part at some point in that case?

A. Yes, I did.

Q. Sometime in January, 1976, was there an arrest made involving suspects with that case?

A. That's correct.

Q. Was one of those people a Willie Barefield also known as Robert Edwards?

A. That's correct.

Q. Do you see that person in the courtroom?

[1-162] A. Yes, I do.

Q. Would you point him out to us, please?

A. Sitting at the defense table to Mr. Brogna's left wearing a blue shirt.

Q. Did you make the arrest personally on Mr. Edwards?

A. I was one of the arresting officers.

Q. Who else—

A. Detective Steve Bunting and a uniform officer by the name of Allen.

Q. And where did you make the arrest?

A. This was at an apartment on East Twenty-Third, Twenty-Third or Twenty-Fourth.

Q. How was it accomplished?

A. We went to that residence, located the suspect, placed him under arrest—after some resistance he was placed under arrest.

Q. Did Mr. Edwards ever attempt to flee from you?

A. Yes, he did.

Q. Did you advise him what you were arresting him for?

A. Yes, we did.

Q. Was that the first thing you did or where did that fit into—

A. Advised him who we were, the fact that [1-163] he was under arrest and a copy of the arrest warrant.

Q. What did he do at that time, that point?

A. Started resisting.

Q. Did he get away from you and start to run?

A. Yes.

Q. What happened then?

A. Officer Allen, the uniformed officer, was around the corner. He ran into Allen and was subsequently subdued and taken into custody.

Q. Was he taken to the Tucson Police Station?

A. He was.

Q. Was he advised of his constitutional rights?

A. He was.

Q. How was that done?

A. I advised him by reading from the card.

Q. Could you tell the jury briefly what the rights are that you advised Mr. Edwards of.

A. He was read the following rights: You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning and [1-164] to be with you during questioning if you so desire. If you can't afford an attorney, you have the right to have an attorney appointed for you prior to questioning.

He was asked, do you understand these rights; He indicated he did.

Now, having been advised of these rights and understanding these rights, will you answer my questions, which he did talk to us.

Q. You talked to him at the police station?

A. That's correct.

Q. That would be the day he was arrested.

A. That's true.

Q. Was that in the afternoon, morning or evening?

A. This was approximately four in the afternoon.

Q. About how long did you talk to Mr. Edwards?

A. All total?

Q. Well, that first day, I guess that's the only day you talked to him.

A. That's correct. I was in his presence, I would guess, two to three hours or so.

Q. Did you talk with him reference the La Conga Bar robbery?

[1-165] A. Yes, we did.

Q. Did you obtain a statement from him?

A. Yes, we did.

Q. What did that statement have reference to?

A. The statement had reference to his alibi.

Q. He gave you an alibi, is that correct, for the date in question?

A. Yes, he did.

Q. Was it—did you talk about this for quite some period of time?

A. We talked to him, yes, throughout the two to three hours we talked about it.

Q. After he gave you this alibi statement, was there a continuing conversation between you and Mr. Edwards?

A. Yes, there was.

Q. Could you explain the tenor of that conversation?

A. Subsequent to the alibi statement he indicated that he wanted—

THE COURT: Please.

MR. EDWARDS: Objection, Your Honor. Hearsay. Not relevant to the case.

THE COURT: Overruled.

THE WITNESS: After—

[1-166] THE COURT: Wait a minute. Relevant? Will the reporter please read the question.

(Whereupon, the reporter did as requested.)

THE COURT: Overruled.

THE WITNESS: After the alibi statement, he indicated he wanted to make a deal, that he had been around and wanted to make a deal with me and I offered him no deal except to explain his side of the situation.

As a matter of fact, he insisted upon talking with the prosecutor in the case. We even eventually made contact with a prosecutor, with the County Attorney's Office. No deal was given to him and we left him with the—him stating that he was going to get an attorney to make a deal for him.

Q. (By Mr. Lingeman) Okay. After he gave the alibi statement and before he began indicating that he wanted a deal and wanted to talk to a county attorney, did you indicate to him that you didn't believe that—

THE COURT: You're leading the witness, Mr. Lingeman. Don't lead the witness.

Q. (By Mr. Lingeman) What did you do, if anything, indicated to him reference the alibi [1-167] statement that he had given to you after that was completed?

A. I indicated to him I didn't believe his alibi at all.

Q. Was that when this request for a deal began and this discussion of a deal?

A. Subsequent to that, yes.

Q. Okay. How long did you go back and forth about this deal?

A. Approximately an hour or so.

Q. You said a county attorney was contacted.

A. Yes.

Q. That wasn't myself, was it?

A. That's correct.

Q. Was there some other county attorney or county attorneys involved at that stage?

A. At that stage Deputy County Attorney Don Becker was involved and we were unable to get ahold of him.

But the contact was made with Chief Deputy County Attorney Randy Stevens that night.

Q. Ultimately you ceased this interview and that was about what time?

A. I believe around seven in the evening.

Q. Now, was that the extent of your conversation with Mr. Edwards reference this case?

[1-168] A. It was.

Q. Okay. And I take it at some time another detective may have spoken to Mr. Edwards, if you know.

A. Yes.

Q. Okay. But you weren't present during any other discussions with him; is that correct?

A. That's correct.

MR. LINGEMAN: That's all the questions I have.

THE COURT: You may cross-examine, Mr. Edwards.

CROSS-EXAMINATION

BY MR. EDWARDS:

Q. Can you remember the date, Sgt. Bunting, that you came to arrest me?

A. January 14th, I think.

Q. Fourteenth?

A. I believe the 14th or 18th.

Q. What year?

A. 1976.

Q. January 14th.

On January 14th that you came to arrest me, did you have another officer with you?

A. That's correct.

[1-169] Q. Would you tell the Court his name?

A. Steve Bunting.

Q. Steve Bunting?

A. No relation.

Q. Was there any people out there while you was knocking—did you see any people, generalized people out there when you was knocking on the door to find out where I stayed?

A. I saw you and the lady that was living in the apartment.

Q. You seen nobody else?

A. I don't recall anybody else. Some children, perhaps, but no adults.

Q. You seen some children.

Now, is it—is it a procedure of the police department to—to—when they come to arrest people, is it a procedure—how do you go about arresting people, do you just read them the warrant and put handcuffs on them and that's it?

A. It depends upon the type of individual to be arrested and the circumstances.

Q. Now, you was with Bunting that day, you said Steve Bunting.

A. Steve Bunting, yes.

Q. That's right. Steve Bunting.

[1-170] Is it a procedure that when you come to arrest somebody you come to arrest people with your guns on and your guns out if you're armed or what?

A. There again, the best answer I can give you, depending on the circumstances and the type of individual and the charges.

Q. Mr. Bunting, when you took me to the police station and interrogated me for how long you say, four hours, three or four hours?

A. I was in your presence approximately three hours, yes.

Q. You say I made a statement.

A. That is correct.

Q. Not a alibi statement.

A. As a matter of fact, it is what I would consider an alibi statement and in your own words it was an alibi.

Q. What is alibi—is alibi saying you wasn't there and denying that you was denied (sic) in the crime?

A. That's correct. Naming people who could place you other places.

Q. So you saying that I made a statement denying that I was at the scene of the crime.

A. That's correct.

[1-171] Q. Did I make a oral statement or a taped statement?

A. You made a taped statement.

Q. Mr. Bunting, did anybody at the police station, can you remember, interrogated me—is it a regular procedure that when you are interrogating people you have more than one police interrogate the people, you have them coming in and out the door constantly?

A. No.

Q. What did you say?

A. No.

Q. Mr. Bunting, you made out a police report; is that correct?

A. That is correct.

Q. Do you remember the police report you made out of ever stating that—that while you was interrogating me at the time of the incident that you said that you didn't believe my—my statement I made to you.

I mean, do all police officers believe when people say they isn't involved in a crime?

A. I'm not sure I understand your question.

Q. I'll state it more clearly, Mr. Bunting.

Do—is it a job for a police to [1-172] believe when a person is asked his involvement in the—in a crime to tell that he wasn't involved in a crime?

Is it a thing that a police that when a person says, "I'm not involved in a crime, I didn't do it," you have—you have conjumptions (phonetic) to believe that he was involved; am I correct?

A. An attempt—correct me if I don't understand—I may misunderstand your question.

Q. Yes.

A. We—or at least myself, dealing with suspects, often are lied to. If that answers your question.

Q. I have one more question to ask you.

It's involvement in your investigation, your—you say you was—you did investigate the La Conga Bar murder, am I correct?

A. I was involved in the investigation.

Detective Marmion was assigned by myself as the lead detective on the case.

I supervise the members of the Homicide Detail. There are other detectives in the detail other than Marmion.

Q. Is it—do—when you arrest people for crimes of being committed, and when they [1-173] being interrogated, do—is it a formal procedure by the police department to—if they have somebody else, what you say, a defendant make another statement against them, is it a formula for the police to play a statement to a client or to a person that he can hear the statement and then—and then—and then lead him to kind of say what he want to say?

A. It's often done when there are multiple suspects in a case and one or more of those suspects has given statements implicating other people.

It's often done that the statement is played or read to the other suspects to indicate to that suspect that, yes, you know, we are not lying to you, this guy told us about it.

Q. Could you give approximate time—do you play the statement over and over or do you just give a little formality thing he can hear and then say okay and cut it off?

A. Depending on the circumstances, whatever—often suspects don't believe that a partner in crime has actually confessed. And sometimes after they hear certain parts of the conversation or certain facts, this person has related, then the guy decides, well, he's going [1-174] to try to tell his side of the story.

Q. Well, Mr. Bunting, as you said, that after I had gave a statement to the police, I think in your—in your report, I don't know if you put it in the report, I think it was played that there was statements read to me of some statements put in my face and then I made that statement that I wasn't involved.

Am I correct?

A. Can you repeat that again?

Q. I'll repeat it more clearly, Mr. Bunting.

I was saying, Mr. Bunting, when I was arrested and taken to the police department and interrogated, there was a statement in front of me, Mr. Reed's statement, that I could look at, you know, and review.

And then—and then I made a statement. I said I would talk to you. Didn't I say that? I would talk to you about my—my side of the story.

A. No. If—if I can see the—give the proper setting.

At the initial time whenever we started interviewing you I explained to you the statements of Reed and also Soto.

And it was at that time that you [1-175] said you were not involved and you had an alibi and you wanted to make a statement.

This was your alibi statement.

Q. Now, Mr.—

A. Then that statement was taken.

Q. Then—

A. Then is when the further discussion about your wanting to make a deal and so forth.

Q. Now, when I asked—you talking about the deal. Was that in my statement that I made to you that I wanted to make a deal?

A. In the tape-recorded statement?

Q. Right.

A. No, it was not.

Q. So this was supposed to have been off the record.

A. No. There was nothing ever said it was supposed to be off the record. We don't go off the record. Everything you say to us goes on the record.

Q. So you got this on the tape that I was going to make a deal.

A. Not on the tape.

Q. So this is nothing but hearsay, Mr. Bunting; is this correct?

MR. LINGEMAN: I believe I want to [1-176] object. He's arguing with the witness and arguing legal principles.

THE COURT: Sustained. I sustained an objection to that question and you will have to ask another question.

MR. EDWARDS: Yes, sir, I understand.

Q. (By Mr. Edwards) I'll say, Mr. Bunting, that how long when you interrogate a person—you say you interrogated me four hours, am I correct?

A. No, sir.

Q. You didn't say that?

A. No, sir.

Q. Explain to the Court how long that you interrogated me.

A. Approximately three hours of interviewing and in my presence. It was not a sustained three-hour interrogation.

Q. Well, was you the only one interrogated me?

A. No. There—Detective Steve Bunting talked to you and Detective Hallums also talked to you.

Q. Did you ever ask, to your recollection, that I wanted to talk to all these police coming in and out the door?

[1-177] A. Beg pardon?

Q. I'll make it more clearly, Mr. Bunting.

Did I ever tell you that I wanted to talk to these police individuals all the time coming in and out the door?

A. No, there was just the three officers.

Q. Now, there was—there was just three officers that interrogated me, am I correct?

A. To my knowledge there was only two officers that talked to you about this, myself and Steve Bunting.

Q. There was two or three, there was three, am I correct?

A. Three is correct. Three officers.

Q. That's right. Now, Mr. Bunting, is it a regular procedure that—that a person that be questioned, being interrogated, if he is read his rights and he's asked for a lawyer, do you all in this procedure constantly keep interrogating or just cut the interrogation off or what do you do? Tell me your procedure.

A. Prior to a subject or a suspect giving a statement, he must waive his rights.

In those rights he is waiving the presence of an attorney.

Q. Now, did anytime—at anytime that the [1-178] statement that you got from another defendant, at anytime that—when your interrogation of me, did I give you details of and involve myself in a murder case?

A. At no time during my interview with you did you implicate yourself in this murder, if that answers your question, sir.

Q. Mr. Bunting, I have one more question to ask of you.

Do you know the officers that took me down that night to the County Jail?

A. I don't recall how you were transported to the County Jail.

Q. Do you recall ever—after this interrogation and the time that I did not involve myself in a crime that I was tooken down and put—put in jail, in solitary, and do you

recall at anytime that morning when I was in solitary, put in solitary confinement, do you recall at anytime that morning did you send any other detective down there to talk to me?

A. I did not send any detective down to talk to you wherever you were at in the County Jail.

And I had no knowledge that you were in solitary.

[1-179] Q. Mr. Bunting, at anytime did—at anytime did I call down to your police station when I was arrested that night to ask any police to come down and talk to me that you hear or anything?

A. Not to my knowledge.

Q. Did you on the time when I was leaving from the interrogation room, did I tell you at anytime there in your report that I wanted to talk to some more policeman?

A. No.

MR. EDWARDS: That's all I have.

THE COURT: Mr. Lingeman, redirect.

REDIRECT EXAMINATION

BY MR. LINGEMAN:

Q. You indicated, Sgt. Bunting, that you advised the defendant of his constitutional rights down at the police station; is that correct?

A. That's correct.

Q. Was this prior to the taped statement or before the taped statement or both?

A. There were two times he was advised. Prior to the interview and then again on tape.

Q. Did he ever indicate to you that he wanted an attorney present or invoke any of his other rights?

[1-180] A. No, he did not.

Q. After you had the alibi statement from Mr. Edwards and he indicated that he wanted a deal, did he indicate to you that if a deal were made he would talk to you some more?

A. That was what he was trying—he was trying to get me to commit myself to a deal. And then he would tell me what he knew.

MR. LINGEMAN: That's all.

THE COURT: Do you have recross?

MR. EDWARDS: Yes, Your Honor, I have one more thing to say.

RECROSS-EXAMINATION

BY MR. EDWARDS:

Q. You just stated that at no time I asked for a attorney; am I correct?

A. That's correct.

Q. Would you read that to yourself there, Mr.—

A. Barefield—

MR. LINGEMAN: Excuse me.

THE COURT: He said to yourself.

THE WITNESS: Oh, I'm sorry.

Q. (By Mr. Edwards) Do you remember that?

A. That is correct.

[1-181] Q. Are you saying you just stated and then I didn't ask for a attorney?

A. This does not state that you were asking for an attorney.

Q. Stating that you are—you are saying that I similar asked for a attorney to make a deal, that I would wait until I got my attorney until I made a deal.

A. That's correct. You said, "I will wait until I get an attorney to make a deal," but you never requested an attorney.

Q. But that's what you said.

A. Yeah, that's what I said.

Q. And one more thing. Did I ask anytime—you said you read me my rights, you read them before and after.

How many times did you read my rights, Mr. Bunting?

A. Twice.

Q. And at anytime did I ask you again when I left from that interrogation room that anytime I told you or your officers or anyone, mainly you, any of you, of your officers, come to see me because later there was something I was going to talk to the police officers?

A. I can only answer to what you said in [1-182] my presence and I don't know what you may or may not have said in the presence of any other officers outside of my hearing.

In my presence you did not request anybody to come talk to you.

MR. EDWARDS: That's all I have.

THE COURT: May he be excused?

MR. LINGEMAN: Yes, Your Honor.

THE COURT: You're excused and thank you.

(Witness excused.)

(Caption Omitted)

Proceedings March 21, 1977

A-30683

[2-17] VICTOR Z. MARMION,

was thereupon called as a witness in behalf of the State, and being first duly sworn, was examined and testified as follows:

THE COURT: Detective, the witnesses in this case are under the Rule so you can't be in the courtroom at any time except when you're testifying.

You're not to discuss your testimony with anyone except the attorneys until the case is finished.

THE WITNESS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. LINGEMAN:

Q. Please state your name and occupation.

A. Victor Z. Marmion, Homicide Detective, City of Tucson.

[2-18] Q. How long have you been so employed?

A. As a police officer a little over ten years. As a homicide detective a little over three years.

Q. Did you ever have occasion to become involved in the investigation of the murder-robbery-burglary of the La Conga Bar back in 1974?

A. I did.

Q. Were you assigned to that case?

A. I was.

Q. Did you continue to investigate it right up to the present date?

A. I did.

Q. Okay. With regard to the La Conga Bar robbery-murder, did you have occasion in 1975 to come in contact with a person by the name of Kevin Reed, aka as Cleveland Reed?

A. Yes, sir.

Q. How did that happen?

A. I was called to the County Attorney's Office, I believe it was by Mr. Harold Higgins by the County Attorney's Office. I was told there was a subject up there named Kevin Reed who wanted to give us a statement on the case.

Q. Did you have a conversation with Mr. Reed?

[2-19] A. I did, sir.

Q. Was a deal made with Mr. Reed in order to secure his cooperation I—

THE COURT: Just a minute.

MR. EDWARDS: I object the way he is leading the witness.

THE COURT: Overruled. You may answer this question.

THE WITNESS: Yes, sir a deal was made through—

THE COURT: I think you have answered it now. Ask another question.

Q. (By Mr. Lingeman) After this statement was made did you obtain a statement from Mr. Reed?

A. Approximately six days later, I believe it was the 17th of September, 1975, when Detective Martin and myself took a statement from Mr. Reed.

Q. At some point in time after you took that statement did Mr. Reed retain—or gain a different status as far as his court appearances were required?

MR. EDWARDS: Object, Your Honor. The district attorney is leading the witness.

THE COURT: You may answer yes or no.

THE WITNESS: Yes.

Q. (By Mr. Lingeman) Okay. Subsequently [2-20] did Mr. Reed get out of jail?

A. He did.

Q. Was there anything that you were supposed to do or Mr. Reed was supposed to do while he was out of jail back in October or whenever it was that—'75—that he got out of jail?

A. No, sir, not that he was supposed to do.

He had agreed to help me in trying to solve the murder case.

Q. You had already gotten statements from Mr. Reed; is that correct?

A. That's correct.

Q. At some point after that did you make an arrest on a person named Robert Edwards, also known as Willie Barefield?

A. I didn't make the arrest. The arrest was made by other detectives of the Tucson Police Department.

Q. Was that under a warrant for the arrest reference the La Conga Bar robbery-murder-burglary?

A. Yes, sir.

Q. Was that in January?

A. I believe it was on the 19th of January of 1976.

Q. Okay. Were you present at the [2-21] arrest or immediately after at the Tucson Police Department?

A. I was present at the Detective Division where Mr. Barefield had been brought.

Q. Did you participate in the conversation with him at that time?

A. No, sir, I did not.

Q. Do you know who was talking with Mr. Barefield at that time?

A. Sgt. Bunting and Detective Steve Bunting.

Q. Okay. The next day did you have occasion to talk to Mr. Edwards?

A. We did. I say we. I mean Detective Milne and myself.

Q. How did that come about?

A. I decided to go over there and talk to Mr. Barfield at the County Jail.

Q. What would have been the date of the conversation?

A. The 20th of January, 1976.

Q. Okay. Was this the immediate day after the arrest?

A. Yes, sir.

Q. Okay. Did you advise the defendant of his constitutional rights?

A. I did.

[2-22] Q. How did you do that?

A. Verbatim from the department standard rights card.

Q. Could you advise the jury the way you did advise Mr. Barefield on the day in question.

A. Yes. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning and to be with you during questioning if you so desire. If you cannot afford an attoney, you have the right to have an attorney appointed for you prior to questioning.

Then I asked him, do you understand these rights?

I also told him, now, having been advised of these rights, and understanding these rights, will you answer my questions.

Q. Did he indicate to you that he understood his rights?

A. He did.

Q. Did he indicate to you that he would answer your questions?

A. Yes.

Q. Did you at any time play a part of a statement by Mr. Manny Soto to Mr. Edwards?

[2-23] A. I did.

Q. About how much of that statement did you play?

A. Approximately nine, no more than 12 minutes.

Q. After you played that portion of Mr. Soto's statement, did you ask Mr. Edwards some questions about the La Conga Bar incident?

A. We did.

Q. Okay. Did you tape record that conversation?

A. No, sir.

Q. Why is that?

A. I asked Mr. Barefield if he would be willing to give me a taped statement. He indicated he did not, because he did not want to have it used against him in court later.

He indicated he would give me a verbal or oral statement, but nothing on tape.

Q. Did you take some time to talk to him about the statement after he told you that?

A. I did.

Q. What did you tell him?

A. I don't recall my exact words, but I said something to the effect, "Well, look, big deal. Milne and I are here together. If you give [2-24] us a verbal statement, we can use that against you in court."

He said he understood. He indicated he would talk to us, tell us anything we wanted to know, but he didn't want it on tape.

Q. Subsequently did he give you his version of what had happened at the La Conga Bar?

A. He did.

Q. Can you tell me what he told you reference the La Conga Bar incident?

THE COURT: Just a minute.

MR. EDWARDS: Objection. Lack of foundation and other legal issues already raised.

THE COURT: Well, the foundation, I think we should have the time and place more definitely and make certain who was present, Mr. Lingeman.

Q. (By Mr. Lingeman) Detective Marmion, I think you have already indicated it was the morning of the 20th.

Could you be more specific about what time it would have been?

A. Approximately nine, nine fifteen a.m.

Q. Who else besides yourself and Detective Milne, who you have already referred to, and Mr. Edwards, was present?

[2-25] A. That's all. Just the three of us.

Q. Was this at the County Jail?

A. It was.

Q. Okay. Why don't you go ahead—

THE COURT: One other foundation. I don't think he has identified the defendant.

Q. (By Mr. Lingeman) Would you please point to the person in this courtroom, if you see him, that you had the conversation with that you have been referring to as Robert Edwards and Willie Barefield.

A. The Negro gentleman to Mr. Brogna's right at the defense table.

MR. LINGEMAN: May the record indicate that the witness has identified the defendant?

THE COURT: Yes. Do you have any other foundation you claim is lacking, Mr. Edwards?

MR. EDWARDS: No more foundation. Just a legal issue that we already raised.

THE COURT: Your objection is overruled and you may answer the question.

THE WITNESS: Would you repeat the question again.

Q. (By Mr. Lingeman) Would you relate to us the conversation you had reference the La Conga Bar.

[2-26] A. Yes. Very briefly, Mr. Barefield told Detective Milne and myself that he had gone over to Manny Soto's house located in the area of Tenth and University. He said he went there approximately three days prior to the murder in question.

He indicated to us at that time that Kevin Reed was also at Manny's house and at that time they were talking about pulling the robbery at the La Conga.

He indicated to us it was at that time that he decided to go along with them.

They went there with the intentions of robbing the old man, in his words.

On the night of the murder, the 9th of October, '74, they arrived in the area of the La Conga approximately 12:30 a.m.

Albert Williams, Manny Soto and Willie Williams were going to act as lookouts and he and Kevin Reed went into the bar.

Barefield stated he was the one that was with Mrs. Esparza and the second victim, Mr. Mungia, was taken into the back room by one of the other defendants, Kevin Reed.

Sometime during the time this was going on he indicated that some shots had been fired and it was Kevin Reed who had fired the [2-27] shots, because the gun had a hair trigger on it.

Mr. Edwards indicated to me he didn't take anything from Mrs. Esparza. He didn't hurt her.

He subsequently took her into the back room where the safe was at and where Kevin Reed and Mr. Mungia were at. Mr. Edwards indicated that Kevin Reed was holding Mr. Mungia at gunpoint and that Kevin Reed forced Mr. Mungia to take the money box and some money bags out of the safe and that Kevin Reed took Mr. Mungia's brown wallet, some money, a wrist watch, and a gold ring with a red ruby stone.

He indicated that Mr. Reed kept possession of all the items except the gold ring with the red ruby stone which he kept himself.

Shortly thereafter Mr. Mungia was left in the chair slumped over and they got scared—I don't recall him saying why.

They ran from the bar. As they ran from the bar they met the other three suspects, a total of five, and ran.

Q. Did he say what the other suspects were doing?

A. Yes, sir. They were supposed to act as lookouts.

[2-28] Q. Did he indicate whether or not he had a gun when he was holding Nellie Esparza in the front of the bar?

A. No, sir. Mr. Barefield told me that the only person that had a gun was Kevin Reed.

Q. Is that all the conversation that you can recall that you had with Mr. Edwards on that day?

A. I remember asking him a couple of questions, but I don't recall what his answers were.

I remember I asked him if he was wearing a stocking mask on that night and I don't remember what his answer was.

Q. Did you make a report up after you had this conversation, including in the report the substance of the conversation that you had?

A. Most of my conversation was covered in my supplement.

Q. Now, you have already testified that at the point where you had a conversation with Mr. Reed, which would have been some months earlier, a deal was made; is that correct?

A. Through the County Attorney's Office, yes, sir.

Q. Up until that time, the time that you got [2-29] together with Mr. Reed, did you have any other investigative leads on this particular case?

A. Shortly after the homicide I had received information from a reliable confidential informant that Willie Williams and Manny Soto were involved in this.

THE COURT: Just a minute.

MR. EDWARDS: I object. Hearsay.

THE COURT: Sustained. I'm going to strike the witness' answer and the jury is to disregard the answer.

Q. (By Mr. Lingeman) My question is, at the time that you made the deal with Mr. Reed, did you have any investigative leads or was the case at an end as far as you were concerned from the investigation standpoint up until the time you got Mr. Reed?

A. At that time I had pretty well exhausted all my possible leads on the case.

Q. What was the reason for the deal that was made with Mr. Reed?

THE COURT: Just a minute.

MR. EDWARDS: Objection. Immaterial.

THE COURT: Sustained.

Q. (By Mr. Lingeman) If you did not have the statement of Mr. Reed, would you have been able [2-30] to solve the case?

THE COURT: Just a minute.

MR. EDWARDS: Objection. Calls for a conclusion.

THE COURT: Sustained.

MR. LINGEMAN: I have no further questions.

THE COURT: You may cross-examine.

MR. EDWARDS: I would like to exhibit Marmion's statement.

THE COURT: You may walk up and get it, Mr. Edwards.

CROSS-EXAMINATION

BY MR. EDWARDS:

Q. Mr.—Detective Marmion, am I correct?

A. Yes, sir.

Q. Do you remember the time of day that they arrest me, can you recall?

A. You were arrested on January 19th, 1976. I don't recall the exact time. Approximately I know. It would be a guess on my part. I'm not positive.

Q. Do you know the arresting officer that arrested me on that date of January 19th, 1976?

A. I do.

[2-31] Q. Could you repeat that to the Court.

A. Detective Sergeant Bunting. Detective Steve Bunting, and Officer Allen with the Uniform Division.

Q. Mr. Marmion, on that day of January 19th when I was arrested, you wasn't the one that interrogated me, am I correct?

A. That's correct.

Q. Was it Steve Bunting and Larry Bunting?

A. Well, I can only say that I saw you in the room with Detective Bunting and Sgt. Bunting. I wasn't present when the actual interview was taking place.

Q. Did they ever after the arrest, January 19th, when they took me to jail, and I was in a solitary on that day of January, do you remember what morning that you come to see me?

A. Well, if I understand you right, I believe I'm getting three questions out of that one.

First of all, I don't know if you were in solitary.

Second of all, it was on the 20th of January, '76, which would have been a Tuesday morning.

Q. Tuesday morning?

A. I believe so.

[2-32] Q. Did Steve Bunting ask you to come down and talk to me?

A. No. I went there of my own accord.

Q. Did I call you to come and talk to me?

A. No, you didn't.

Q. Did Mr. Steve Bunting tell you that I had made a statement?

A. I knew that you had talked to Sgt. Bunting and Detective Bunting.

Q. Do you remember whether it was a taped statement?

A. I know that they had taken a taped statement, yes.

Q. Did you ever see the first taped statement that was given; did you ever see it, Mr. Marmion?

A. I saw it, but it wasn't until sometime later.

I say sometime later. I mean days later because it had to be transcribed and typed.

Q. Do you recognize that, Mr. Marmion?

A. Well—

THE COURT: What is that, by the way? Let me see the exhibit number for the record.

Exhibit K.

THE WITNESS: It's my understanding in [2-33] talking to Sgt. Bunting this was a transcript of your conversation with him.

However, I can't testify to it because I wasn't present when this conversation took place.

Q. (By Mr. Edwards) Do you recall that statement? You say you looked over it.

A. I just briefly went through it later on, yes.

Q. Was it there, the type of involvement or any involvement in that taped statement I gave saying I was in any crime?

A. I don't quite understand the question.

Q. I'll make it more clear, Mr. Marmion.

Is that statement that I made on tape knowing that it could be used against me, was there any involvement that was involved in any crime that I made on the taped statement?

MR. LINGEMAN: Objection, Your Honor. Based on hearsay.

Q. (By Mr. Edwards) Could you read it, Mr. Marmion?

A. I just very, very briefly read it. If you're going to—I very briefly read it.

Q. Oh. You very briefly read it.

A. I don't recall the details. In order to [2-34] refresh my memory I would have to read it.

Q. Would you refresh your memory, Mr. Marmion.

A. Yes. Do you want me to read the whole thing?

Q. Yes.

MR. LINGEMAN: Your Honor, could we approach the Bench?

THE COURT: Yes.

(Whereupon, a bench conference was had out of the hearing of the jury, to-wit:)

MR. LINGEMAN: It's apparent that the witness is not going to be able to testify to the facts contained in the report or the statement because he was not present at the time. He is not the proper witness.

It seems useless to have him read the statement for a half hour.

THE COURT: Do you object to him reading it?

MR. EDWARDS: I'm asking him to read it to himself, not out loud.

THE COURT: But even if he does, any question you asked him would be objectionable. He can't testify. There are all kinds of reasons. It would be a conclusion on his part. The state-[2-35]ment speaks for itself. It's hearsay. There is no proof that he read this before he went to the jail and talked to you.

In fact, the proof is to the contrary.

I'll sustain all the objections and have you get into another area.

(Open court.)

THE COURT: I sustained an objection to your reading the exhibit and unless something further arises you're not to read it.

Ask another question, Mr. Edwards.

Q. (By Mr. Edwards) Mr. Marmion, when you came down with Detective Miles (sic) after I was arrested January 19th, do you remember the morning what time it was, you know, do you remember the time that you came and interviewed me?

A. It was with Detective Milne and it was approximately 9:15 a.m.

Q. Now, on nine fifteen, Mr. Marmion, you came down here on your own request after knowingly that I asked not to talk to anyone.

A. I didn't know that and I did go of my own accord. No one told me to go and no one requested me to go.

Q. Now, when you—when I was pulled out [2-36] of confinement and into the interrogation, was it a attorney booth that you recollect was the attorney booth that you and Detective Miles I was brought to?

A. When Detective Milne and I had a conversation with you it was in one of the—or one of the attorneys' booths as they are commonly referred to.

Q. You started reading me my rights before I got in the room.

A. Before I had any conversation, that's the first thing I did, that's correct.

Q. Did you play—did you play any tapes toward me, you know, did you play, like you say, you played the Soto tape in my behalf so I could listen to the evidence, the procedure that you go through.

A. At your request I did play part of Manny Soto's taped statement.

Q. Then I gave you a statement.

A. You did subsequently, yes.

Q. Mr. Marmion, did I request for you to play the tape statement over so I could hear them, do you remember?

A. No. No. I had the—I had the file and tape myself. I was the chief investigator in [2-37] the case. I brought them on my own.

Q. You always carry other people's tapes?

A. It's not unusual. Not in all cases, but I do carry them sometimes, yes.

Q. Now, when I gave you a statement verbally, did you make notes or how do the procedure go of a verbally statement?

A. How did I make notes in reference to your statement to me?

Q. Right.

A. After we had conducted the interview with you, when Detective Milne and I went outside we got in our police vehicle. I talked into the tape recorder and recorded everything you had told us.

Q. So you took down notes of what I told you, am I correct?

A. No. I didn't take notes at that time. I just put it on tape when we walked out of the jail and got into our police car.

Q. You made a statement to the Court that—saying that you told me, Mr. Edwards, you know that what—which way ever you talk you can use it against me in a court. It could be used against me.

A. Yes, I did.

[2-38] Q. Now, Mr. Marmion, to recollect your memory, did you ever—did you ever tell me that—that—that Williams was already caught or on that date that Williams was already caught and he was going to tell you everything and something like that toward me; did you ever say that in your conversation with me on that date of January 20th, 1976?

A. I remember when Detective Milne and I were talking to you in one of the attorneys' booths that we were notified that we were wanted at the Detectives Division because Willie Williams had been apprehended, yes.

Q. You didn't answer my question.

I asked you did you tell me that you knew Williams was going to talk to you and include me in the crime of a murder and robbery?

A. I don't recall telling you that.

Q. You recall other things, but you don't recall that.

A. Yes. I'm sure we were inside the room and were contacted by one of the jailers and we were told that Willie Williams was in custody and they were awaiting—you were there when we were told this, but I don't remember telling you that Willie Williams was going to talk or anything like [2-39] that.

Q. You don't remember saying that?

A. I don't remember saying that, no.

Q. Mr. Marmion, everything that you can recollect that you said that I didn't want a taped statement used, that knowingly that—that I didn't want used against me, but knowing I could make a verbally statement, that that could be used against me.

Mr. Marmion, is that a intelligent knowing that if he make a taped statement and knowing that it could be used against him, that if he knowing that, if he say anything in front of the police that it can be used against him, that if he says anything in front of the police that it could be used against him, is that a very bright person, Mr. Marmion?

A. I lost you about halfway through that.

Q. I'll explain it to you again, Mr. Marmion.

On the date of January 20th, 1976, are you saying that I was sitting there with you and Detective Miles, am I correct?

A. Detective Milne. That's correct.

Q. And I said that I did not want a tape statement because it could be used against me in [2-40] a court of law.

A. That's correct.

Q. But a verbally statement could be used and before I made that verbally statement and you stated, "Mr. Edwards, you make a taped statement or a verbally statement, either one could be used against you in a court of law."

A. If I understood your question correctly, you indicated you would talk to us.

I indicated—I made it very clear to you that your verbal statement could be used against you.

You replied that you understood, but you wouldn't give us a taped statement because you didn't want it used against you in court at a later time.

Q. Mr. Marmion, so you're telling the Court that—that I made—that it was a oral statement, so I know that could be used against me.

A. What I'm telling the Court is—what I'm testifying is what I remember happened that particular day, what you said to me.

And you said you would talk to us and tell us what you knew, but you wouldn't give us a taped statement. That's what I'm telling the Court.

[2-41] I also explained to you—

Q. I just asked a question yes or no.

I asked you, all I asked you, Mr. Marmion, did I say that I know that a oral statement could be used against me so I was going to make a oral statement.

A. Yes. You made it very clear to me that you understood. That's what I'm telling the Court.

Q. Do you have that in your report, Mr. Marmion?

A. I don't believe I do, no. Which part are you referring to?

Q. Your report. Now, I know, Mr. Marmion, that when Steve Bunting made a report and everthing I said he put in the report, everything our conversation, is it—is it a police or the way procedure they go that everything you say they put in the reports? I mean, on paper everything you tell them.

A. We try to put the majority of our information on one of our reports. It's impossible for us to put all the information on.

Q. So everything that I said are supposed to discriminate me that you could put down, but things that I did not say or you can't recall or [2-42] recollect, then you saying that I could—that I did make a statement orally, knowingly and intelligent knowing that it could be used agianst me, that you explained that even before I even gave you a statement.

A. I believe I got three questions out of that.

THE COURT: Would the reporter read the last question, please.

(Whereupon, the reporter did as requested.)

THE WITNESS: I explained to you in the presence of Detective Milne that the statement would be against you, the oral statement. I have the majority of the information in my supplement, not all of it. As I indicated, I can't record everything on my reports. It's impossible.

Q. (By Mr. Edwards) Did you—

A. As far as my discriminating, I don't discriminate in my police reports regardless.

Q. I did not ask you that. I asked you when I gave a oral statement what you saying a confession, did Mr.—Detective Miles, did he ever leave the room when I was talking to you?

A. Detective Milne was there the entire period of time except for a very short period of [2-43] time when he walked out in reference to Willie Williams being apprehended for a matter of a minute, maybe two minutes.

Q. But he left the room.

A. For a very short period of time. Maybe a minute or two.

Q. One question, Mr. Marmion, I must ask you. That—that all police procedures and all officers do interrogations go by procedures or interrogations the way that you all—that the line of that you direct a procedure, do they go all by line procedure or by line of procedure or just by the form of, you know, procedures? Do they go by the procedures?

A. No, sir, there is not a procedure.

Q. There is no procedure?

A. Depending on the circumstances.

Q. Mr. Marmion, on that morning of the 20th, I recall that—Mr. Marmion, on the 20th—on the 21st, I think it was the 21st, did you ever come down again?

A. Come down where?

Q. Back to the jail.

A. I did,

Q. Who did you come and talk to?

A. Willie Williams.

[2-44] Q. Did you ever talk to me on the 21st, Mr. Marmion?

A. No, I did not.

Q. You don't recollect or you don't remember?

A. I didn't talk to you on January 21st.

Q. Do you remember, did you talk to me at any time after that?

A. I talked to you several days later after January 20th, yes.

Q. Did you have a conference with me to—to mention what the D.A. wanted?

A. I had a conversation with you and I was there at your request.

Q. I didn't ask you that, Mr. Marmion.

I asked did you have a conversation, conference with me that you wanted to know what the D.A. wanted, you came down with the D.A. and wanted a taped statement.

A. That wasn't a conference. That was a conversation.

Q. You're not asking (sic) my question yes or no.

Did you tell me the D.A., District Attorney, was wanting a taped statement from me?

A. I know I did not. I asked you if you [2-45] would give me a taped statement. That was at my request. I was the one that was asking.

Q. Why did you want one, Mr. Marmion?

A. Standard police procedure. You had already confessed to me and I wanted a taped statement. That's standard police procedure.

Q. That's standard police procedure that you wanted a taped statement because—because you—because that's standard police procedure, am I correct?

A. We always like to have taped statements anytime we can get them, yes.

Q. Can you get a taped statement, Mr. Marmion?

A. From who?

Q. From me.

A. No, sir, I did not. I got a verbal or oral statement, whichever.

Q. Why did, on the 23rd or the 24th, if you cannot remember, why I did not want to tape a statement, do you recall?

A. I don't remember the exact date, but you said you didn't want to give me one.

Q. Because it would be used against me.

A. That's what you said.

Q. Mr. Marmion, when a statement is played [2-46] and a person hears what another person is saying, can he rehearse the other person in the statement?

A. Can he what?

Q. Can he rehearse another person's statement?

A. I can't answer for another person.

Q. You're not answering my question, Mr. Marmion.

I'm asking you if another person, if you sits in front of the defendant here and played ten or 20 minutes, can you rehearse another persons and say, "Yeah," and then just say, "Yeah," to what the other person says?

A. Are you saying you can or another person—

Q. To make it more clear, Mr. Marmion, like a tape recorder sits here in front of a person and you turn the tape on and you listen to another person confess about ten minutes, you listen to every detail, and cut it off, can another person rehearse another person's case by listening to it?

MR. LINGEMAN: Objection. Calls for speculation.

THE COURT: You can answer, if you understand the question.

THE WITNESS: I can't honestly answer [2-47] for another person. I don't know what goes through another person's mind.

Q. (By Mr. Edwards) I'm not asking you that. I'm asking you a question which to me is a yes or no answer.

I'm asking you can another person play another tape—to explain, make it more clearly, you have a tape in front of another person and you turn a tape of another man's confession on and you listen. Another person listen to that confession. And then—and then shoot it right back on.

A. Again, I don't believe I can answer the question. I can't answer for another person. What caliber of person, what level of intelligence. I can't answer your question, sir.

Q. I mean, a person—what I mean, rehearse. I mean to listen and hear a person talk and then he can say, "Well, all right, man, I'll talk to you. I'll tell you what you want to know."

A. Again, in all fairness to—

Q. Well, I—

A. I can't answer your question.

Q. Did you ever play a taped statement in front of me, Mr. Marmion, when I was supposed to [2-48] have made a statement?

A. I played a statement on Tuesday, January 20th at your request.

Q. Was it Soto's statement?

A. Yes.

Q. Approximately how long was it played?

A. Approximately nine, no more than 12 minutes.

MR. EDWARDS: I have no more questions.

THE COURT: Mr. Lingeman.

REDIRECT EXAMINATION

BY MR. LINGEMAN:

Q. Did you play the entire confession or just the first nine or 12 minutes.

A. Just the first nine or 12 minutes.

Q. Was that the entire time or just the beginning of it?

A. That was just the beginning. Just the beginning.

MR. LINGEMAN: That's all I have.

THE COURT: Mr. Edwards, anything further?

MR. EDWARDS: Oh, yes, I have one more question.

[2-43] **RECROSS-EXAMINATION**

BY MR. EDWARDS:

Q. I want to make known this on the record, Mr. Marmion, and that when I talked first to the first detective, I did not ask you to come down, am I correct?

MR. LINGEMAN: Objection. Asked and answered.

THE COURT: Overruled.

THE WITNESS: When I contacted you I went there of my own free will. I don't know what you told the other detective.

Q. (By Mr. Edwards) I'm not asking you that. You can't answer that because you weren't there.

Did I ask you to come and talk to me?

A. No, you did not the first time.

The second time, several days after the 20th of January, yes, you did ask to speak to me.

Q. Did I make any statement to you, did I make any statement to you that I was going to tape it or it was going to be used against me?

A. I asked and you said you didn't want to give one. You didn't want it used against you, [2-50] yes, you did make that statement.

Q. All right. Mr. Marmion, I have one more and I guess that's about it, Your Honor.

Did you ever try, when you and Mr. Reed (sic) was interrogating—when you and Mr. Reed was trying, would you say, solve the case?

A. Um-hum.

Q. Did you—when you got a confession from Mr. Reed involving himself in a crime, was he ever bugged on the street to put bugs on, police things to get more information of the crime?

A. We asked Mr. Reed if he would agree to let us put a bug on him and he said no way. We never did put one on him, no.

Q. Did you tell about that in your police report?

A. No, I did not.

MR. EDWARDS: That's all.

THE COURT: May he be excused?

MR. LINGEMAN: I have more questions because there was something else brought up.

THE COURT: I'll permit you to have re-redirect.

REDIRECT EXAMINATION

BY MR. LINGEMAN:

[2-51] Q. Have you testified before or given other information, or is this the first time this has ever come up about the bugging?

A. This is the first time I'm positive. It was never brought up.

Q. It was not brought up in the Soto trial.

A. No, I don't believe so.

THE COURT: Just a minute.

MR. LINGEMAN: That's all.

MR. EDWARDS: Immaterial.

THE COURT: Sustained. You may be excused.

[2-52] CHARLES MILNE,

was thereupon called as a witness in behalf of the State, and being first duly sworn, was examined and testified as follows:

THE COURT: Detective, the witnesses in this case are under the Rule. This means that you cannot be in the courtroom at any time except when you're testifying.

You're not to discuss your testimony with anyone except the attorneys until the case is finished. Thank you.

DIRECT EXAMINATION

BY MR. LINGEMAN:

Q. Please state your name and occupation.

A. Charles Milne. Detective, Tucson Police Department.

Q. Were you so employed back in 1974-75?

A. Yes, I was.

Q. How long have you been so employed?

A. Ten years.

Q. Did you have occasion to become involved with Detective Marmion in the investigation of the La Conga Bar robbery-murder?

A. Yes, I did.

[2-53] Q. Did you come into contact with Robert Edwards in regards to that investigation?

A. Yes, I did.

Q. And do you see Mr. Edwards in the courtroom?

A. Yes. He's the defendant sitting at the defense table.

Q. Did you have occasion to go to the Pima County Jail in 1976, it would have been January 20th, and have a conversation with Mr. Edwards at that time?

A. Yes.

Q. Okay. Who else was there besides yourself and Mr. Edwards?

A. Detective Marmion.

Q. Anyone else?

A. No, sir.

Q. About what time of the day was this?

A. It was approximately nine fifteen in the morning.

Q. Was the defendant advised of his constitutional rights before you talked to him?

Yes, he was, by Detective Marmion.

Q. Okay. And at some point in time was part of a tape from the person by the name of Manny Soto played for the defendant Mr. Edwards?

[2-54] A. Yes.

Q. Okay. At some point in time was a request made to tape a conversation between Detective Marmion and Mr. Edwards at that time?

A. Yes.

Q. Was the conversation subsequently taped?

A. No, sir.

A. Why not?

A. The defendant did not wish to have his voice recorded on tape.

Q. Was there some discussion or explanation by Detective Marmion that his statement could still be used even if it was not taped?

A. Yes.

Q. Can you tell me what you remember about that explanation?

A. Detective Marmion indicated that no matter what statements the defendant made to us, they could be used in court.

And the defendant indicated he understood that. He just didn't want his voice put on tape.

Q. Okay. Do you remember the conversation then that was had between Mr. Edwards and yourselves?

A. Yes.

[2-55] Q. Was it yourself or Detective Marmion that was actually doing the questioning?

A. Detective Marmion.

Q. Were you just there listening?

A. Yes.

Q. Would you tell me as best you can recall the substance of that conversation.

A. Detective Marmion asked the defendant to explain his participation in the robbery that occurred at the La Conga Bar.

He indicated that he was at Mr. Soto's residence approximately three or four days prior to the actual robbery. At that time Mr. Soto and Mr. Reed were drawing up a plan to pull the robbery and at that time he decided to go along with the other two.

On the morning of the robbery Mr. Soto, Mr. Reed, the defendant and Willie and Albert Williams responded to the bar. This was approximately twelve thirty in the morning.

They waited until the bar patrons had left. One of the individuals, I think it was Mr. Soto, looked through a window of the bar to see where Mr. Mungia and Nellie Esparza were located.

As those two people came out of the [2-56] tavern, they were met by Mr. Barefield—excuse me—Mr. Edwards and Mr. Reed.

He indicated that Mr. Reed was the only one that had a gun at that time. The other individuals acted as, according to Mr. Edwards, lookouts for him and Mr. Reed.

They went into the force—forced the victims back into the tavern and a short time later Mr. Reed had fired a couple of rounds from the revolver that he had.

Mr. Barefield—Mr. Edwards, I believe, indicated that the weapon that Mr. Reed had had a hair trigger on it, or something to that effect.

Mr. Mungia was taken into the back room of the tavern where the safe was located. He indicated they knew where the safe was because Mr. Soto had advised them he knew where it was because he had burglarized the bar on a previous occasion.

A short time later Mr. Edwards took Mrs. Esparza into the back room and when they entered the back room Mr. Mungia was in a chair and Mr. Reed was threatening him if he didn't open the safe and give them the money.

Subsequently the safe was opened. [2-57] I believe it was a metal money box and some money bags were taken out of the safe and then some personal items of Mr. Mungia's were removed from his person, according to Mr. Edwards, by Mr. Reed.

Except for a ring that Mr. Mungia had, which was given to Mr. Edwards by Mr. Reed, Mr. Reed kept all the remaining property.

And they subsequently ran from the tavern, meeting the other three outside.

Q. Is that all you can remember of the conversation?

A. Yes. Basically, yes, sir.

Q. How long did this conversation take place?

A. We were with Mr. Edwards approximately an hour and a half, maybe.

MR. LINGEMAN: That's all the questions I have.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. EDWARDS:

Q. State your name.

A. Charles Milne.

Q. Who?

A. Charles Milne.

[2-58] Q. Milne?

Q. Detective Mr. Milne, that was on the date of the 20th you say.

A. The 20th of January, yes.

Q. About nine thirty in the morning?

A. Roughly, yes.

Q. How could—how did you come out to the jail, did anybody tell you to come, did your—your lieutenant or I know they have a top person there, ask you to come and interview me?

A. My supervisor instructed me to accompany Detective Marmion, yes.

Q. Who was your supervisor that asked you to come and interview me?

A. Sgt. Bunting.

Q. So Sgt. Bunting asked you to come to interview me to make a confession, am I correct?

MR. LINGEMAN: Objection. That's not what the witness testified to.

THE COURT: You may answer. Overruled.

THE WITNESS: I was instructed by Sgt. Bunting to accompany Detective Marmion to the Pima County Jail where you were located at the time and conduct an interview.

Q. (By Mr. Edwards) Did Sgt. Bunting tell [2-59] you that he had already interviewed me?

A. No, sir, he did not.

Q. You came out there the morning about nine thirty and you were with Detective Marmion.

A. Yes.

Q. When—do you remember where I was? I mean, where you was to the interview, where you hold the interview that morning?

A. Yes. It was in one of the attorneys' booths.

Q. Mr.—before you interview me, I didn't have a attorney then, did I, when you came to interview me?

A. I don't know if you had one at that point or not.

Q. You know how I think, Mr.—Mr. Milne, you have been in homicide—how long have you been in homicide?

A. I was in homicide approximately 13 months.

Q. Thirteen months. So I think you know how the Court procedures go.

A. Somewhat.

Q. When you came down that morning, I was arrested January 19th, I think you recall that.

A. Yes.

Q. And I was brought to jail that night and [2-60] that morning I was supposed to have went to arraignment; is that correct?

A. It would be the following afternoon.

Q. I never went to arraignment while you was supposed to come down and interview me, am I correct?

A. You had not been to any type of a court arraignment prior to the time we talked to you.

Q. Mr. Milne, is arraignment where attorneys is appointed?

A. In some cases, yes.

Q. So I never had a attorney, am I correct, when you investigated—interrogated me.

A. I don't know, Mr. Edwards. It would be very possible for you to have a private attorney.

Q. So you're telling the Court that Sgt. Bunting asked you to come see me on that morning.

A. Sgt. Bunting instructed me to accompany Detective Marmion.

Q. Mr. Milne, on that—on that—when we can come down to recall that when you was in the little—the little law booth or attorneys' booth or what we can refer to—the D.O., did you send a D.O. to come get me?

A. A detention officer?

Q. Right.

[2-61] A. A request is put in through the jail personnel and they are the ones that brought you up to our booth, yes.

Q. Do you know that—that I was brought out of confinement to where you was at?

A. No, sir. You were brought up from some sort of confinement.

Q. Now, the detention officer brought me to the—to the attorney booth where you and Milne and, well, Detective—just you and Detective Marmion was sitting. Did you—what is the first thing you remember saying to me?

A. After you had sat down and Detective Marmion sat down, Detective Marmion advised you of your constitutional rights.

Q. And then after he advised me of my constitutional rights, a tape recorded was played.

A. Detective Marmion went through your rights rather thoroughly to make sure you understood all your rights.

Q. Thoroughly?

A. And also the fact that you had the right to an attorney. You did not request one at that time.

I believe you asked to hear the statement of Manny Soto.

[2-62] Q. How long—do you know how long that was played?

A. I recall it was approximately ten minutes or so.

Q. Mr. Milne, when you made out of what do you call it, report, did you have a interview that I had made a statement to you?

A. Detective Marmion indicated in his supplemental report that I was present during the time that the statement was made, but I never made one personally, no.

Q. Then it's not in your supplemental report.

A. No, it's not.

Q. Now, can you tell me or tell the Court how a verbal, what you call oral statement to a police officer, you know, how do you know—how do they make—I mean, is the defendant or the people you interrogating making a oral statement to you and put on a tape recorder or is it made like that or how is it made?

A. A verbal statement is just that, it's a statement made by an individual to a police officer.

Q. Is it on your regular procedure that you put it on a tape record?

[2-63] A. I'm sorry.

Q. Is it on your regular procedure that you put it on a tape recorder?

A. In all cases we try to get the statement put on tape, yes, sir.

Q. Could you tell me, Mr. Milne, when you was in this attorney booth with—with Mr. Marmion and I was present and you asked me and Mr. Marmion direct questions to me about making a statement, I said, could you tell the Courts mostly what did Marmion tell me?

A. Detective Marmion asked if you would supply a taped statement. You indicated that you preferred not to because you knew that the statement could be used in court.

Detective Marmion then advised that any statement you made to us could be used in court.

You indicated that you understood this, but you just did not want your voice recorded.

Q. Are you telling the Courts that I knew that either way it went that if I made a taped statement it could be used against me, but I didn't want my voice on the tape recorder, is that what you're saying?

A. Yes, sir.

[2-64] Q. Then you're saying again that you making the Court—telling the Courts here that I had made a verbal statement, but I knew that it could be used against me.

A. Yes, that was made very clear to you, sir, at the time.

Q. Mr. Milne, at any time of that day when me and Mr.—Mr. Marmion was—you called talking or interviewing, you called it investigation or interrogation, can we say that—did you leave or did you ever leave the period of time that me and Mr. Marmion was talking?

A. Yes, I left for a short period of time when I was notified by the jail personnel that I had a phone call.

Q. So—so you're telling me that all of the interrogation of you and what's his name, you wasn't there to hear the rest of what he talked about, you left for a little moment and come right back, is that what you're saying?

A. Yes. It was for a short period of time, a couple of minutes.

Q. A couple of minutes.

Mr. Milne, did you ever come back—come back down to the jail again?

A. Yes. I don't—it was, from what I [2-65] recall, it was several days after.

Q. Who was you down there to talk to?

A. I don't know who we talked to specifically, but we did—I think Detective Marmion was with me at the time and Detective Marmion had contacted you.

Q. Do you know what—you know what he contacted me for?

A. Again, I believe it was to see if you wanted to put the information down that you had given us on the statement and again you refused.

Q. Because it could be used against me, am I correct?

A. I don't know why you refused.

Q. Mr. Milne, I want to make it known—I mean, what—what intelligence of a person or way a person can be that knowingly and willingly make—I mean, what intelligence can we say that a person can, say, talk to a policeman and say, "All right. I'll make—I'll make a verbal statement."

A. Well—

Q. Let me finish my question, Mr. Milne.

A. Excuse me.

Q. "I'll make a verbal statement, but I don't make a taped statement 'cause it will be [2-66] used against me, the verbal statement."

Now, Mr. Milne, I'll make it more clear what I'm trying to say.

Is it—is it—since you have been a homicide or since you have been in the homicide as a police officer, and since your duty to—you must go by form of duties, am I correct, a line of duties and form of interrogation.

A. There are some procedures we follow, yes, sir.

Q. You do not break the procedures, do you?

A. They are not set dealings, Mr. Edwards. Everything has a degree of flexibility to it.

Q. Mr.—I'm asking you do not break them, do you? All you can say is yes or no.

A. Yes.

Q. Mr. Milne, is there any type of procedures where that you—that you offer deals?

A. I don't believe a police officer has the authority to make a deal or promises or whatever, that type of circumstance is done through the County Attorney's Office.

Q. Did you ever come and contact with Mr. Reed?

[2-67] A. I had very brief contact with Mr. Reed, yes.

Q. Did—was you at the people—I mean, was you at the time he suppose to have confessed?

A. No.

Q. How did you come in contact with Mr. Reed?

A. Through assisting Detective Marmion.

Q. Did you know about when he was released, did you know about what you call a bug or a device put in his clothes to where he could get more information?

A. As far as I know Mr. Reed never had a bug put on his clothes or person.

Q. Did the police ever ask him to do that at no time?

A. I believe he was asked.

Q. To get more information.

A. Well, I'm assuming that is what it was for. I wasn't present during this conversation.

MR. EDWARDS: That's all I have, Your Honor.

THE COURT: Mr. Lingeman.

MR. LINGEMAN: Nothing further, Your Honor.

THE COURT: You may be excused.

(Caption Omitted)

Proceedings March 22, 1977

A-30683

[3-9] DAVID HOFFMAN,

was thereupon called as a witness in behalf of the defendant, and being first duly sworn, was examined and testified as follows:

THE COURT: Mr. Hoffman, the witnesses in this case are under the Rule, but I'm not going to place you under it yet.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. EDWARDS:

Q. Would you state your name.

A. David Hoffman.

Q. Could you tell the Court when you was my previous attorney and what year.

A. I believe—I don't have my file with me. I believe it was probably in 19—either late 1975 or early 1976. Certainly at the commencement of this case whenever the court's records indicate the first indictment was quashed by Judge Gin, whenever that indictment was handed down, whenever you were arrested I became your attorney.

THE COURT: He was arrested in January of 1976.

THE WITNESS: So it was January of 1976 [3-10] I believe I took the appointment in this case.

Q. (By Mr. Edwards) Mr. Hoffman, as you previous know that I was arrested January 19, 1976, and rearraigned and then you became my attorney, am I correct?

A. That's correct.

Q. As you became my attorney on that date it was a statement brought against me, am I correct?

A. There was an allegation that you had made a statement, yes.

Q. On that allegation that I had made a statement of 19—1976, was it one or two statements, Mr. Hoffman?

A. There was an allegation that you had made two statements to the police, that you talked with them on two occasions.

Q. Did we ever have a conversation about the statement that I had previous made?

A. We certainly did.

Q. Will you tell the Court that conversation?

A. The conversation was that with regard to the first statement, that wherein you denied any participation in the crimes alleged, you said that you had in fact said that.

[3-11] When it came to the second statement you said that you never said that to the police officer and demanded that the police officer—or that I make the police force—excuse me—that I make the police officer produce some tape recording of this statement you supposedly made or some written record of this statement and he was unable to do so with the exception of his report.

(Caption Omitted)

Proceedings March 24, 28, 1977
A-30683

[4-2] DAVID BARRY GURLAND,
was thereupon called as a witness in behalf of the defendant, and being first duly sworn, was examined and testified as follows:

THE COURT: Dr. Gurland, the witnesses in this case are under the rule, so you can't talk with anybody except the attorneys in this case and that includes the defendant. You're not to be in the courtroom except when you're testifying.

THE WITNESS: Yes, sir.

THE COURT: Mr. Edwards, you may [4-3] proceed.

DIRECT EXAMINATION

BY MR. EDWARDS:

Q. State your name.

A. David Barry Gurland, M.D.

THE COURT: I'm aware of Dr. Gurland's qualifications as a psychiatrist if counsel want to stipulate to that.

MR. LINGEMAN: I'll stipulate, Your Honor.

THE COURT: All right. What I'm saying is that Dr. Gurland may testify in this court as an expert witness on any—and express opinions in the medical field of psychiatry.

You may proceed.

Q. (By Mr. Edwards) Dr. Gurland, did you ever come in contact with me in 1976?

A. Yes, I did. The 2nd of December, 1976.

Q. Did your examination was on a Rule 11, was that correct?

A. That's correct, yes.

Q. And in your examination you found me competent to stand trial, am I correct?

A. That's correct, yes.

Q. While your examination—your examin-[4-4]ation of me, could you tell the Court that range of intelligence that you found out that I was supposed to be, Dr. Gurland?

A. I estimated your intelligence range to be somewhere in the dull normal range. Eighty to 90 I.Q. points.

Q. Is that normal, could you explain more what it is?

A. That would be low average or dull normal, if that's what the range would be considered.

People understand things, function, handle jobs of certain limitations, be able to be educated up to a certain degree.

Q. Dr. Gurland, could you tell he Court if a person's intelligence range is from 80 to 90 what is their intelligence about knowing or we could say in knowingly and intelligently knowing about police procedures and things like that?

A. They would have enough intelligence to understand what the reading of, say, the Miranda rules would be. They would be able to understand what the policeman would be saying to them as to, you know, did they want an attorney, did they wish to remain silent, did they know anything that they said could be used against them. They would know what that meant.

[4-5] Q. Mr. Gurland, did I—did we ever, while our examination was going on, did we ever occur, talk about the case of this murder case, did we ever talk about it in any way, conversational-wise?

A. I think I asked you some things about it, about your knowledge of it and so forth.

You pretty much denied any knowledge of what you were being charged with.

We didn't get into any further details than that.

Q. Dr. Gurland, in your report did you ever talk about the length of time that the defendant was ever in jail that would create a lapse of memory?

A. I think I did make mention of the fact that you had been in jail for approximately a year, I think, at the time that I saw you and I felt it had somewhat dulled your ability to think, that you were not as sharp as—and I think I related it to a report or a tape that I had heard that—of you speaking with an investigating officer about a year ago. And your thinking was quicker at that time. Probably more like you are today than you were when I saw you on the 2nd of December.

MR. EDWARDS: That's all the questions [4-6] I have.

MR. LINGEMAN: No questions.

(Captions Omitted)

Proceedings April 21, 1977

A-30683

[147] CLEVELAND REED aka KEVIN REED having been first duly sworn, testified as follows:

THE COURT: Mr. Reed, the witnesses in this case are under the rule so you are not permitted to be in the courtroom at anytime except when you testify.

In addition, you're not to discuss your testimony with anyone at all except the attorneys until the case is finished. Do you understand this?

THE WITNESS: Yes.

DIRECT EXAMINATION

BY MR. LINGEMAN:

Q. State your name, please.

A. Cleveland Reed.

Q. Also known as Kevin Reed?

A. Yes.

Q. Where do you reside?

A. Pima County Jail.

[148] Q. Mr. Reed, were you involved in the robbery of the La Conga Bar back in 1974?

A. Yes, I was.

Q. And were you apprehended in 1975 on some separate different charges sometime in '75?

A. Yes, I was.

Q. Where were those charges—what were those charges?

A. Armed robbery and—well, no, it's separate charges in '75—I was apprehended for grand theft, auto theft and arson third degree.

Q. Okay.

Do you have any felony convictions at this time?

A. Yes, I do.

Q. What are those?

A. The grand theft I was arrested for in '75. Also armed robbery and possession of a firearm after a felony.

Q. Okay.

What's that armed robbery conviction from and the other possession of a firearm from?

A. The State of Kansas.

Q. Are you currently under sentence from Kansas?

A. Yes, I am.

[149] Q. What's that sentence?

A. The sentence is five to ninety-nine, and one to ten.

Q. What is the one to ten?

A. Possession of a firearm.

Q. Okay.

Do you have any sentence here that you're under sentence for?

A. Yes.

Q. What are those?

A. It's three to four for grand theft.

Q. Okay.

Does that grand theft three to four run concurrent—at the same time as the five to ninety-nine in Kansas?

A. Yes.

Q. You understand you have to go back to Kansas and serve your time in Kansas when you're through here?

A. Yes.

Q. When you were apprehended in '75, did you indicate to the authorities that you had information from the La Conga Bar robbery?

A. Yes, I did.

Q. Did you arrange a deal then with the County Attorney's Office about—reference that [150] information on the La Conga Bar Robbery?

A. Yes, I did.

Q. Okay.

What was the deal that was made exactly?

A. That if I gave testimony concerning the armed robbery of the La Conga Bar then I would be granted immunity from it and all charges derived from it.

Q. What about those other charges that you were picked up, the grand theft and the auto theft, and the arson third degree?

A. In a plea bargain to grand theft, I pleaded guilty to grand theft, and the others would be dropped.

Q. Okay.

Any sentence that you got resulting from the grand theft, was that to run concurrent with your sentence in Kansas?

A. Yes, that was part of it.

Q. Okay.

Now, sometime after the deal was made in '75 were you released from custody?

A. Yes, I was released OR.

Q. Okay.

Was that a couple of weeks after the deal was made?

[151] A. Yes, it was.

Q. And were you supposed to be remaining here in Tucson?

A. Yes, I was.

Q. Did you remain here in Tucson?

A. No, I didn't.

Q. Where did you go?

A. I left and went back to Wichita, Kansas.

Q. Were you arrested there back in Kansas?

A. Yes.

Q. What were you arrested for?

A. For an armed robbery that had happened in '74, early part of '74.

Q. Robbery that occurred before this robbery even took place at the La Conga Bar?

A. Yes, sir.

Q. The charge was outstanding against you there?

A. Yes, it was.

Q. Did they know about those charges here in Tucson when you were arrested?

A. No, sir.

Q. Why didn't they know about them?

A. Because at the time I didn't tell them and also I was going under an alias name.

Q. When I say "them" I'm talking about the [152] people that gave you the OR?

A. Right.

Q. They didn't know your charge?

A. No, there was no—I hadn't told them and they couldn't check it out through the records because I, at the time, was under an alias.

Q. What was the alias?

A. Kevin.

Q. Kevin Reed?

A. K-e-v-i-n.

Q. What is your real name?

A. Cleveland.

(Caption Omitted)

Proceedings April 26, 27, 1977

A-30683

[5-109] Ladies and gentlemens of the jury, we have a policeman. His name was Sgt. Bunting of the State witness.

Sgt. Bunting said on that date he arrested me in 1967—1967, January, 16 months after the crime he had alleged my testimony or statement that he had made. Mr. Reed's statement that he had made when he had been caught, not after he had made the statement further, but after he had been drug back from Kansas City and then he involved me in a crime.

Ladies and gentlemens of the jury, you see Mr. Bunting said the man had a alibi statement and I had a alibi statement of what we call the police say alibi statement.

To see I don't understand alibi. I understand the statement where my whereabouts were at the time this crime was supposed to have alleged.

You see that Mr. Bunting got on the stand, this was a police officer. "No," he said, he wasn't involved. And then he made a statement here and then he made the statement to [5-110] you.

You must take that because there was evidence in presenting it to you.

Ladies and gentlemens of the jury, then after that day when I was taken to jail, it was supposed to be a man named Marmion come to see me.

Marmion come to see me and he allege that he talk to me. He allege that I gave what you call a statement of my involvement in the crime.

He alleged that I was involved in the crime, but he never alleged to you to explain how he understand me that he got the statement.

He allege to you that I told him that I was involved in a crime. He took a piece of paper, ladies and gentlemens. It couldn't come from my first tape. He never told it was voluntary.

You must consider if my statement is voluntary. If any statement you make to the police officer is voluntary.

Marmion never told you it was voluntary, but he couldn't produce taped statement that I was supposed to have told him, show him the statement involved and everything. He [5-111] mentioned in the statement he introduce it from his mind after he has talked to me and made a transcript of the statement.

He never presented the statement. They never presented anything to what a man wrote up his self on a piece of paper and then he says I was involved in the crime.

You must take the statement of two. The statements of evidence that are presented to you. Must take the evidence that are presented to you, ladies and gentlemens.

The evidence that you heard from my own voice, that you heard on tape, that you heard with voluntarily made, you must take that all because it was presented as evidence.

And then you must take, and then the statement that the police alleged against me was not on tape, was—was not anywhere, but not what you call from mine, what I wrote up his self. Wrote it himself.

Ladies and gentlemens, you must take that into what we call into consideration, into evidence.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

NO. 79-5269

ROBERT EDWARDS,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ORIGINAL COPY

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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-vs-

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Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

I. WAS APPELLANT'S CONFESSION OBTAINED IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL?

II. WAS APPELLANT FORCED TO APPEAR AT TRIAL IN PRISON CLOTHES?

III. WAS DEFENSE TESTIMONY PROPERLY PRECLUDED FOR FAILURE TO MAKE TIMELY DISCLOSURE?

IV. WAS THERE IMPERMISSIBLE COMMENT ON APPELLANT'S FAILURE TO TESTIFY?

V. WAS APPELLANT DENIED HIS RIGHT TO A SPEEDY TRIAL?

STATEMENT OF THE CASE

On October 9, 1974, a robbery occurred at the LaConga Bar in Tucson. (R.T. of Apr. 21, 1977, at 15.) During the robbery, Carlos Mungia, the owner of the bar, died of a heart attack. (Id. at 17-20.) Mrs. Esparza, the only surviving witness, was never able to identify who the intruders were. (Id. at 22.)

By September 1975, the police had exhausted all of their possible leads. (R.T. of Apr. 21, 1975, at 118-19.) At that time, Cleveland (Kevin) Reed, who had been arrested on other charges, told the police that he could give them information about the LaConga robbery. (Id. at 106.) He was one of the individuals involved in the robbery, and gave the police all the details in exchange for a grant of immunity.

On January 19, 1976, the Tucson Police obtained a complaint charging appellant, Robert Edwards, and Willie Leroy Williams with the murder of Carlos Mungia and the robbery and burglary of the LaConga Bar. On January 23, 1976, the Pima County Grand Jury returned an indictment against Manuel Chiquete Soto, Willie Leroy Williams, and Willie Barefield aka Robert Edwards, charging them with the above crime. On March 5, 1976, Edwards' attorney filed a motion for redetermination of probable cause, based on the fact that the grand jury transcript had omitted from it the prosecuting attorney's explanation to the jury of the definition of murder. Soto and Williams joined in this motion. The state opposed this motion. The trial court ruled that the defendants had the right to have a full transcript of the grand jury proceeding, and that the omission deprived them of this right. It noted that it had no reason to believe that anything improper had been done by the county attorney. It nonetheless quashed the indictment.

The state then filed a motion of appeal and a motion to stay the proceedings in the superior court. On May 13, 1976, the Court of Appeals issued its opinion denying the special action. State v. Superior Court, 26 Ariz.App. 482, 549 P.2d 577 (1976). The opinion stated that there was no intimation that the county attorney had made any improper remarks, but denied the special action because there was no way of telling from the grand jury transcript what had transpired. 26 Ariz.

App. at 484, 549 P.2d at 579. The court denied rehearing on June 16, 1976, and the state filed a petition for review. On July 20, 1976, the Arizona Supreme Court denied the petition. This order was received by the Court of Appeals on July 26, 1976.

On July 30, 1976, Soto, Williams, and Edwards were reindicted under cause no. A-30683. Trial was set for September 28, 1976. On September 8, 1976, Williams' and Edwards' attorneys moved to continue the trial date so that they could prepare for the trial and find alibi witnesses. (R.T. of Sept. 8, 1976, at 7-18.) The state said that it was ready to go to trial on September 28, 1976, but otherwise took no position on the motion. (Id. at 8, 13.) The trial court granted the motion, and continued the trial to October 27, 1976. (Id. at 18-19.)

On September 7, 1976, Edwards' attorney filed a motion to dismiss on speedy trial grounds. On stipulation, hearing on this motion was continued. Williams' attorney filed a similar motion on September 14, 1976. Edwards joined in this motion.

Soto's attorney then filed a motion to sever. (R.T. of Sept. 22, 1976, at 2.) The trial court granted this motion. (Id. at 5.) Soto's attorney also filed a motion to dismiss on the basis of a denial of speedy trial. (Id.) Williams and Edwards did not join in the motion, but reserved the right to make the same motion at a later date. (Id. at 16.) The trial court denied Soto's motion to dismiss. (Id. at 18.)

Williams' and Edwards' attorneys then filed a motion to continue so that they could interview doctors who would be witnesses. (R.T. of Oct. 4, 1976, at 2, 5.) The state joined in the motion for the same reason, and also because of a schedule conflict. (Id. at 6.) The trial court granted the

motion, excluded the time, and continued the trial to approximately November 15, 1976. (Id. at 7.)

On October 5, 1976, Edwards' attorney filed a memorandum in support of his motion to dismiss on speedy trial grounds. The basis of this motion was the Rule 8 time limits from the January 19, 1976, arrest date, and the prejudice under the Sixth Amendment because he could not locate Delores Williams, Pat Brown, and Chenise Wilson, all of whom, it was claimed, would testify that Edwards was somewhere other than the LaConga Bar at the time of the robbery. Edwards' attorney also filed a motion to suppress his statements, and a motion for a mental examination.

The trial was subsequently set for November 15, 1976. (R.T. of Nov. 9, 1976, at 10.) Williams' and Edwards' attorneys again filed motions to continue on the basis that they were having trouble contacting Nellie Esparza, and trouble contacting expert witnesses who, it was hoped, would testify in their behalf. (R.T. of Nov. 16, 1976, at 3-4.) The trial court granted the motion and continued the trial to December 7, 1976. (Id. at 7.) The defendants then argued the motion to dismiss on speedy trial grounds. (Id. at 14-24.) The trial court denied this motion.

The trial court granted the motion for a mental examination. (R.T. of Nov. 16, 1976, at 46-47.) Because one of the doctors was not able to complete his examination by December 7, 1976, the trial court continued the trial to December 14, 1976. Again, the doctors were not able to complete their reports, and the Rule 11 hearing was continued to January 3, 1977. On that date, the trial court found both defendants competent to stand trial. (R.T. of Jan. 3, 1977, at 77.)

On January 4, 1977, Edwards filed an oral request, and Williams filed a written request, for new attorneys. (R.T. of Jan. 4, 1977 at 3, 6, 10.) Edwards' basis was that he did not think that his attorney had enough experience. (Id. at 8.) Williams' basis was that he felt there was a conflict between his attorney and himself, and that his attorney was not ready to go to trial. (Id. at 11-12.) The trial court denied these motions. (Id. at 37.) It did, however, conduct a hearing to determine whether the defendants were competent to waive counsel and defend themselves. (R.T. of Jan. 5, 1977, at 4.) The trial court determined that the defendants were competent, and appointed them as their own attorneys. (Id. at 87.) The trial court gave the defendant a waiver of counsel form to sign. (Id. at 99.) The defendants refused to sign them, claiming that they did not waive counsel, they only refused to be represented by their present attorneys. (Id. at 100, 104-05.) The trial court therefore reversed its decision to let defendants represent themselves. (Id. at 106-08.) The defendants' attorneys again urged the motion to dismiss for denial of speedy trial, arguing the same grounds as previously presented. (Id. at 130-31, 133, 141-43.) The trial court took the motion under advisement and ultimately denied it. (Id. at 156.)

Williams' and Edwards' attorneys then filed a special action challenging the ruling of the trial court refusing to allow defendants to represent themselves, and obtained an order staying the trial proceedings. The Court of Appeals indicated that it would lift the stay to allow the trial court to appoint new counsel. (R.T. of Jan. 18, 1977, at 4.) The trial court did so, and reset the trial for February 18, 1977. Williams' and Edwards' new attorneys then moved for a continuance on the basis that they needed more time to prepare for the trial.

(R.T. of Feb. 3, 1977, at 3-6.) The trial court granted the motion over the state's objection, and reset the trial for March 3, 1977. (Id. at 6, 13-14.) Williams' and Edwards' attorneys then filed another motion to continue on the grounds that they were having difficulty obtaining a suitable expert witness (the same reason that was urged in the November motion to continue). (R.T. of Nov. 16, 1976, at 3-4.) The trial court denied this motion. (R.T. of Feb. 28, 1977, at 11.) Williams and Edwards then filed motions to dismiss their new attorneys, and appoint new counsel. (R.T. of Mar. 2, 1977, at 2-3.) The grounds were that the attorneys had not adequate time to prepare the case. (Id. at 6-7; R.T. of Mar. 3, 1977, at 3.) The trial court then made a finding that the defendants were competent to represent themselves, and so appointed them. (R.T. of Mar. 2, 1977, at 50-51; R.T. of Mar. 3, 1977, at 65-68.) Williams then filed a motion to continue to obtain some out-of-state witnesses. (R.T. of Mar. 3, 1977, at 69-70.) Edwards stated that these witnesses had nothing to do with his case. (Id. at 85.) The trial court granted the motion over the state's objection, and reset the trial for March 11, 1977. (Id. at 73, 93-94.)

The trial court then heard Edwards' motion to suppress his statement to the police. (R.T. of Mar. 4, 7, 11, 1977, at 4.) Sergeant Bunting testified that he read Edwards his Miranda rights at the police station after his arrest on January 19, 1976. (Id. at 8.) Edwards stated that he understood his rights, and gave a tape-recorded statement, in which he gave an alibi. (Id. at 10-11.) Detective Hallums, who knew Edwards previously, then spoke to him, the result of which Edwards wanted to make a deal. (Id. at 12-13, 19-20, 58.) Bunting talked further with Edwards, who later said that he wanted to talk to an attorney before he made a deal. (Id. at 16-18,

20.) At this point the questioning stopped. (Id. at 21-22.) During this time, Edwards never said that he would not talk without an attorney present, and was apparently cooperative. (Id. at 27-31, 59.)

Detective Marmion, who was the lead detective on the case, testified that, the next day, he and Detective Milne went to talk to Edwards. (R.T. of Mar. 4, 7, 11, 1977, at 24-25, 40, 51.) Marmion knew that Bunting had spoken with Edwards, but he did not know what had been said, and further, Bunting had not told Marmion to speak to Edwards. (Id. at 24, 39-40.) Marmion again advised Edwards of his rights, and Edwards said first he wanted to hear the tape of Manny Soto's confession. (Id. at 46, 51.) After he heard about 10 to 12 minutes of the tape, Edwards said he would give a statement, but that he did not want it taped because he did not want it used against him. (Id. at 42-43, 51-53.) The officers made it very clear to Edwards that a verbal statement could be used against him in court. (Id. at 43-45, 52-54, 67-69.) Edwards then made an oral statement. (Id. at 53.)

On Friday, March 4, 1977, Edwards testified at the voluntariness hearing. At this time, he acknowledged making the taped exculpatory statement on January 19, 1976, but denied making the oral incriminating statement on January 20, 1976. (R.T. of Mar. 4, 7, 11, 1977, at 34-38.) On Monday, March 7, 1977, Edwards again testified. This time, he said that he asked for an attorney before he made the January 19 statement. (Id. at 73-74.) He further changed his story from the previous Friday, and now admitted that he made an oral statement on January 20, 1976. (Id. at 85-87.) His explanation for this inconsistency was that he had been "confused" on Friday. (Id. at 87, 91.) After argument, the trial court took the motion under advisement. (Id. at 114.)

Originally, the trial court granted Edwards' motion to suppress. (R.T. of Mar. 8, 11, 14, 16, 1977, at 37.) The trial court ruled that all of the statements were voluntary, and could be used in rebuttal. (Id.) It found that the officer's testimony was credible and that Edwards' was not. (Id. at 37-38.) It found that Edwards' statement on January 19, 1976, that he wanted to make a deal was an indication that he did not want to make a statement until he was represented by an attorney. (Id. at 38-39.) It further found that the questioning stopped at this point. (Id. at 39.) It then found that, the next day, Detective Marmion went to interview Edwards on his own initiative, without any compulsion or wrongdoing. (Id.) It held, however, that, once Edwards indicated on January 19, 1976, that he wanted an attorney, any further questioning of Edwards was a per se violation of Edwards' right to an attorney under Miranda, whether or not the officer knew of the request for an attorney. (Id. at 39-40.) The basis for this ruling was State v. Sauve, 112 Ariz. 576, 544 P.2d 1091 (1976). (Id. at 40.)

The following Monday, the state provided the trial court with the case of State v. Travis, 26 Ariz.App. 24, 545 P.2d 986 (1976). (R.T. of Mar. 8, 11, 14, 16, 1977, at 55-56.) The trial court noted that it had not considered the Travis case when it ruled on the motion to suppress, and that it found that the Travis case was directly on point. It therefore reversed its ruling, and found the statements admissible. (Id. at 64-65.)

Edwards then moved to sever his trial from that of Williams. (R.T. of Mar. 8, 11, 14, 16, 1977, at 83.) The trial court granted this motion. (Id. at 99.) The trial ultimately ended when the trial court declared a mistrial because the jurors were unable to reach a unanimous verdict.

Edwards' second trial began April 20, 1977. Prior to the start of the trial, Edwards informed the trial court that his civilian clothes had either been stolen or misplaced. (R.T. of Apr. 20, 1977, a.m., at 1-9 to 1-10.) He did not, however, ask for a continuance, nor did he refuse to go to trial in the clothes he was wearing. (Id.) The trial court ordered the sheriff to make every effort to find the missing clothes, and report back to the court. (Id. at 1-10.) That afternoon, Edwards again raised the matter of his clothes. (R.T. of Apr. 20, 1977, p.m., at 72.) Edwards' attorney informed the trial court that he had called the sheriff's office right after the trial court had entered its order that morning, and that the sheriff's office had initiated the search immediately. (Id. at 73-74.) Edwards' attorney said that he would check with the sheriff's office that evening, and, if the clothes had not been found, would try to find some other clothes for Edwards. (Id. at 74.) No further mention was made of clothes after that, nor does the record indicate what Edwards was wearing after that.

On April 21, 1977, testimony began. Nellie Esparza testified about what happened at the LaConga Bar on October 9, 1974. Mrs. Esparza never said on direct what race the intruders were, but Edwards, on cross-examination brought out the fact that they were black. (R.T. of Apr. 21, 1977, at 22, 28-29, 42.) Officer Larry Bunting then testified about the arrest of Edwards on January 19, 1976, and the statement that he made that night. (Id. at 62, 67.) Upon cross-examining Officer Bunting, Edwards made the statement that he had been put in solitary, a fact which Officer Bunting had not given in his testimony. (Id. at 93.)

Detective Marmion then testified including testimony about the confession Edwards made on January 20, 1976. (Id. at

109-12.) Again, on cross-examination, in asking his questions, Edwards stated facts that had not come out in the testimony. (Id. at 125, 128.) Cleveland (Kevin) Reed then testified, and said that he and Edwards were the ones who robbed the LaConga Bar. (Id. at 152, 155, 157-59.) Again, Edwards talked about himself and his role in the robbery when asking questions on cross-examination. (Id. at 173, 178-79.)

On April 22, 1977, Edwards' attorney notified the state that Edwards wanted to subpoena Frenchy Campbell, an inmate in the County Jail, as an alibi witness. (R.T. of Apr. 22, 1977, at 3-6.) The state objected to this untimely disclosure. (Id.) The trial court reserved ruling on this. (Id. at 3-7.)

The state then called Oletha Delores Williams Hunter, Edwards' common-law wife and alibi witness. (R.T. of Mar. 24, 28, 1977, at 4-19 to 4-24, 4-34; R.T. of Apr. 21, 1977, at 93, 191; R.T. of Apr. 22, 1977, at 3-10 to 3-12, 3-16 to 3-17.) She testified that Cleveland Reed, Edwards, and her brothers Willie and Albert Williams came over to her house at about 3:00 a.m. the night of the LaConga Bar robbery. (R.T. of Apr. 22, 1977, at 3-12 to 3-15.) Reed and Edwards then began arguing about money. (Id. at 3-13.) This corroborated Cleveland Reed's testimony. (R.T. of Apr. 21, 1977, at 162.) Prior to their arrival, she had been alone there with her children. (R.T. of Apr. 22, 1977, at 3-15.) Edwards again cross-examined this witness using facts that had not been brought out, and would only have been known to him. (Id. at 3-17 to 3-19.)

Dr. Brucker then testified that Mr. Mungia died of a heart attack. (R.T. of Apr. 22, 1977, at 3-39 to 3-43.) He further testified that the heart attack was precipitated by the "fight, flight, fright" syndrome caused when the intruders put the gun

to Mr. Mungia's head, and made him open the safe. (Id. at 3-47 to 3-49.)

The trial court then considered the question of allowing Frenchy Campbell to testify as an alibi witness. The county attorney had interviewed Mr. Campbell, and had come to the conclusion that he was not able to give any testimony about Edwards' whereabouts at the time of the robbery. (R.T. of Apr. 22, 1977, at 3-131, 3-187.) Edwards informed the trial court that Mr. Campbell would testify that he was extremely intoxicated the night of the robbery, and that he had not been listed earlier because he had had hepatitis, and could not come to the courthouse. (Id. at 3-188 to 3-191.) The trial court said it would hear an offer of proof the following Monday. (Id. at 3-191.)

The following Monday, the offer of proof showed that Mr. Campbell would not give any alibi statements, but would instead give testimony supporting an intoxication defense, a defense that had not previously been disclosed. (R.T. of Apr. 25, 1977, at 4-4, 4-7 to 4-8.) Edwards again said this witness had not been disclosed at the first trial because he had had hepatitis. (Id. at 4-11.) The trial court found that the witness had not been timely disclosed, and imposed the sanction of precluding his testimony. (Id. at 4-12 to 4-13.)

After Edwards had presented his evidence, and the parties were about to give their closing arguments, the state asked the trial court to admonish Edwards not to argue to the jury about the death penalty and "fighting for his life" as Edwards had done at the first trial, and asked the trial court to instruct Edwards that he must confine his argument to facts in evidence. (R.T. of Apr. 26, 27, 1977, at 5-83.) Edwards had been previously told this by the trial court. (R.T. of Mar. 17, 18, 1977, at 1-11.) Edwards said that he agreed with

this, and said that he knew that he could not argue what was not in evidence. (R.T. of Apr. 26, 27, 1977, at 5-84.) The trial court, however, granted the state's motion to admonish Edwards. (Id.)

Upon commencing his closing argument, the state's attorney wrote on the easel "Defendant confessed." (R.T. of Apr. 26, 27, 1977, at 5-85, 5-166.) He asked the jury to remember in particular the testimony of Detective Marmion, Detective Milne, and Sergeant Bunting in that regard. (Id. at 5-85.) After the state's attorney had concluded, Edwards wrote on the easel "Defendant did not confess." (Id. at 5-97, 5-166.) Edwards then argued to the jury that, because Marmion and Milne only gave testimony of an oral confession, and had no evidence of a written confession, the jury should take that to mean that Edwards did not confess, and should "take that into what we call into consideration, into evidence." (Id. at 5-111, 5-127, 5-128.) Later, he said "[a]s you heard in my statement, I was at a party," referring to the taped statement. (Id. at 5-115.) He then discussed his alibi explanation, many of the facts of which he had provided to the jury while questioning his witness. (Id. at 5-115 to 5-116; 5-40 to 5-42, 5-45 to 5-46, 5-48.) He again told the jury that his defense was that he was not there at the time. (Id. at 5-118, 5-134 to 5-135.) He made further references to statements he had made and explanations he had made, and denied making the confession of January 20, 1976. (Id. at 5-124, 5-126 to 5-128.) Additionally, Edwards disregarded the trial court's admonishment and, on two occasions, told the jury that he was facing the death penalty. (Id. at 5-119, 5-120, 5-137.)

In his final argument, the state pointed out to the jury that no witness had taken the stand and given evidence that Edwards did not confess. (R.T. of Apr. 26, 27, 1977, at 5-138

5-139.) Edwards' attorney then made a motion for a mistrial based upon the reasoning that Edwards was the only one who could have given evidence that he did not confess, and that this statement called to the jury's attention the fact that Edwards did not take the stand in his own behalf. (Id. at 5-139.) The trial court denied this motion. (Id. at 5-140.) The state's attorney made further comments, and again Edwards' attorney moved for a mistrial. (Id. at 5-143 to 5-144, 5-147 to 5-148.) The trial court again denied the motion. (Id. at 5-148.)

The jury ultimately found Edwards guilty of all three counts. The trial court subsequently sentenced Edwards to death. The Arizona Supreme Court affirmed the conviction, but remanded the case to the trial court for another mitigation hearing. State v. Edwards, 122 Ariz. 206, 594 P.2d 72 (1979). After this hearing, the trial court sentenced Edwards to life in prison. This petition followed.

JURISDICTIONAL STATEMENT

Petitioner claims a deprivation of the rights guaranteed under the Fifth, Sixth, and Fourteenth Amendment, and seeks review pursuant to 28 U.S.C. § 1257(3).

ARGUMENT

I

PETITIONER WAIVED HIS SIXTH AMENDMENT RIGHT TO AN ATTORNEY PRIOR TO QUESTIONING.

Petitioner contends that his confession was taken in violation of his Sixth Amendment right to be represented by an attorney. The circuits that have addressed this issue have held that, once an accused has indicated that he wishes to consult an attorney prior to questioning, there is per se rule that prohibits further contact with the accused, and that the accused may make a subsequent, valid

waiver of counsel. United States v. Hauck, 586 F.2d 1296 (8th Cir. 1978), cert. denied, ___ U.S. ___, 99 S.Ct. 2170, 60 L.Ed.2d 1050 (1979); White v. Finkbeiner, 570 F.2d 194 (7th Cir. 1978); United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir.)(en banc), cert. denied, 436 U.S. 919 (1978); United States v. Grant, 549 F.2d 942 (4th Cir.), cert. denied, 432 U.S. 908 (1977); United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976), cert.denied sub nom. Inciso v. United States, 429 U.S. 1099 (1977); United States v. Clark, 499 F.2d 802 (4th Cir. 1974); United States v. Hodge, 487 F.2d 945 (5th Cir. 1973); see United States v. Charlton, 565 F.2d 86 (6th Cir. 1977), cert. denied, sub nom. Jacek v. United States, 434 U.S. 1070 (1978). In this case, petitioner said that he did not want to discuss a deal without first talking to an attorney. The police immediately stopped questioning him. The next morning, two other officers (who did not know about the previous request) went to see petitioner. They played for petitioner a taped statement by Manny Soto where he said that petitioner had done the killing. Petitioner then indicated that he would make a statement. The officers first readvised petitioner of his rights, which he acknowledged. The trial court and the Arizona Supreme Court were therefore correct in determining that there had been a valid waiver of counsel.

Petitioner contends that there is a split in the circuits on this point, citing United States v. Rodriguez-Gastelum, supra, Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979)(en banc), and United States v. Priest, 409 F.2d 491 (5th Cir. 1969). In Priest, a 19-year-old with an 8th grade education requested an attorney. The police ignored the request, and continued their interrogation.

The court there held that there was no waiver of the rig to an attorney. In Nash, there was an equivocable request for an attorney, whereupon the assistant district attorney asked some clarifying questions, and the suspect then gave a statement. The majority reaffirmed the rule in Priest that the interrogation must cease once thee has been an unequivocable request for an attorney, but held that the inquiry may continue if there has been an equivocable request. The dissent noted that, once there has been an unequivocable request for an attorney, the police may come back and ask the suspect if he has changed his mind if there has been a temporal break in the custodial interrogation after the request for counsel. 597 F.2d at 520 n.2. In Rodriguez-Gastelum, the question was identical to that in Nash: May the inquiry continue in the face of an equivocable request for an attorney. The court then went on, however, to hold that, once the suspect has made an unequivocable request for an attorney, there is no per se rule prohibiting further statements by the suspect, and therefore the suspect can change his mind and waive his right to an attorney.

It seems, then, that there is no conflict in the circuits: All agree that, once a suspect has invoked his right to an attorney, there is no per se rule that prohibits a confession in the future. Once a suspect has invoked this right, however, the government has a heavy burden in showing that the suspect made a voluntary waiver of this right previously invoked. The only difference between the circuits seems to be what will be a sufficient showing that there was a voluntary waiver. In the present case, petitioner's confession would be held admissible under any of the tests adopted. As petitioner concedes,

his confession would be held admissible under the Ninth Circuit test set forth in Rodriquez-Gastelum. But the confession would also be admissible under the Fifth Circuit test in Nash because there was a temporal break between the request for counsel and the purported waiver. Since petitioner would not prevail under either test, should this court desire to settle any inconsistencies in the different tests, this would not be the case to do so because no relief could be granted. Moreover, this Court presently has before it a case dealing with a confession after an assertion of the right to counsel. State v. Innis, ___ R.I. ___, 391 A.2d 1158 (1978), cert. granted, 440 U.S. 934 (1979). A decision in that case may clear up any ambiguities presently existing.

ARGUMENT

II

THE RECORD DOES NOT REFLECT THAT PETITIONER WAS FORCED TO STAND TRIAL IN PRISON GARB.

Petitioner contends that he was forced to stand trial in prison garb. The rule in this area is well-settled by Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), and does not need further amplification by this Court. The Arizona Supreme Court found that the record was silent on this particular issue. 122 Ariz. at 215, 594 P.2d at 81. Since petitioner would still have a state remedy available under Rule 32, Arizona Rules of Criminal Procedure, respondent submits that it would be proper to have petitioner exhaust his state remedies before consideration of this issue by federal courts.

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ARGUMENT

III

THE TRIAL COURT PROPERLY PRECLUDED PETITIONER'S WITNESS FOR FAILURE TO MAKE TIMELY DISCLOSURE.

Petitioner contends that it was improper for the trial court to preclude the testimony of Frenchy Campbell. This Court has held that preclusion is permissible if it is reciprocal. Waridus v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973); Williams v. Florida, 399 U.S. 28, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). Rule 15, Arizona Rules of Criminal Procedure, provides such reciprocal sanctions. In this case, petitioner wanted to present the testimony of Frenchy Campbell, who purportedly was at the same party as petitioner on the night of the murder 3 years before, and coincidentally happened to run into petitioner while they were both inmates at the Pima County Jail. Although petitioner contended that Frenchy Campbell would be an alibi witness, Campbell could only testify that petitioner was intoxicated at 6:00 p.m., which was 7 hours prior to the time of the killing. In light of the failure to disclose this intoxication defense, the trial court was correct in precluding this witness. And, in light of the fact that Campbell could only testify that petitioner was intoxicated at 6:00 p.m., while Oletha Delores Williams Hunter testified that she picked up petitioner at the party at 6:00 p.m. and was able to testify about the extent of petitioner's intoxication, the Arizona Supreme Court was correct in concluding that there was no prejudice.

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ARGUMENT

IV

THE PROSECUTING ATTORNEY DID NOT IMPROPERLY COMMENT ON THE FAILURE OF PETITIONER TO TAKE THE WITNESS STAND.

Petitioner contends that the prosecuting attorney improperly commented on his failure to take the witness stand, as is prohibited by Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). The Arizona Supreme Court concluded that any improper comment by the prosecuting attorney was invited by petitioner's closing argument stating facts not supported by the testimony. The record reflects that the Arizona Supreme Court was correct in this conclusion.

Petitioner attempts to characterize the decision of the Arizona Supreme Court as somehow based upon the fact that petitioner represented himself. A careful reading of the opinion shows that this was not the case; the same result would have been reached whether petitioner or an attorney made the improper remarks.

There was, however, a further argument by the state based upon the fact that petitioner represented himself that the Arizona Supreme Court did not utilize in its opinion, but that this Court would have to face if it chose to grant this petition. Griffin holds that the state and the trial court cannot draw adverse inferences from the exercise by a defendant of his right to remain silent. But in the present case, petitioner did not remain silent. All the while he cross-examined witnesses, he continually presented facts, not from the mouths of the witnesses, but instead from his own mouth while he asked the questions. Petitioner in effect testified without having to subject himself to cross-examination. Because he did not remain

silent, the comments by the prosecutor were not a comment on the exercise of his right to remain silent. To reverse on this issue would mean the conclusion that the jurors had failed to notice the petitioner had failed to testify, and only became aware of this fact when the prosecuting attorney brought it out in rebuttal. This would be an assumption even more doubtful than the doubtful assumption rejected by this Court in Lakeside v. Oregon, 435 U.S. 333, 339-40, 98 S.Ct.1091, 1095, 55 L.Ed.2d 319, 325-26 (1978).

This does not mean that a defendant would be penalized for exercising his right to represent himself under Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). If a defendant asked questions the way an attorney would, that is, no attempt to testify at the same time, there would be no comment permitted by the prosecuting attorney. It would only be in situations where the defendant used his right of self-representation as a means of being able to testify without being subject to cross-examination that the prosecutor would be given the right to comment on the fact that the defendant has given only a partial explanation, not a full one.

ARGUMENT

V

PETITIONER WAS NOT DENIED HIS RIGHT TO A SPEEDY TRIAL.

Petitioner contends that he was denied his right to a speedy trial. The test in this area is plainly set forth in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Under this test, the Arizona Supreme Court noted that the delay was 14 months, but that only 4 of these months was due to the state. It found that the 4 month delay was proper, and was caused by a good faith

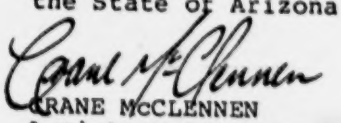
attempt by the state to litigate its rights. It found that petitioner asserted his right to a speedy trial, although the respondent disagrees with this conclusion. Finally, on the most important issue, the Arizona Supreme Court found that petitioner was not prejudiced by the 14 month total delay, and was certainly not prejudiced by the 4 month delay caused by the state. Petitioner was therefore not denied his right to a speedy trial.

CONCLUSION

Based upon the foregoing authorities and arguments, respondent respectfully requests that this Court deny this petition.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General of
the State of Arizona



CRANE McCLENNEN
Assistant Attorney General

Attorneys for RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-5269

ROBERT EDWARDS, Petitioner

v.

THE STATE OF ARIZONA, Respondent

PETITIONER'S REPLY MEMORANDUM ON CERTIORARI

MICHAEL J. MEEHAN
P.O. Box 2268
Tucson, Arizona 85702

Counsel for Petitioner

November 19, 1979

The Respondent has stretched the record almost beyond recognition in its attempt to convince this Court that the case is one only of disputed fact. Contrary to the State's assertions, the record is straight forward and squarely presents the important issues raised by the Petition.

For example, the State seeks to remove all connection between the Police Sergeant (Bunting) to whom Edwards made his request for counsel on the night of his arrest, and his two subordinates (Marmion and Milne) who instituted an interrogation of Edwards the next day. The State says "Bunting had not told Marmion to speak to Edwards" (Response, p. 7). It says that two officers "who did not know about" Edwards' prior request to obtain counsel obtained the confession (Response, p. 14). But, the fact is that Bunting, who did know, specifically directed Milne to interrogate Edwards (II P. 58; Petition at 5). And as the dissent by the Arizona Supreme Court notes, he did it to see what could be gotten before Edwards could be appointed counsel that afternoon.

Similarly, the State blandly describes the record pertaining to prison garb as a situation in which Edwards simply "informed the Court" that his civilian clothes had been misplaced, and did not ask for a continuance or "refuse to go to trial" in "the clothes he was wearing" (Response, p. 9). The State then says "the record does not reflect that Petitioner was forced to stand trial in prison garb" (Response, p. 16). As has already been noted (Petition, p. 6), the record is replete with indication that Edwards was in "slippers and jailhouse clothes" (1 Tr. 9), unlike the first trial when, as the trial judge put it, "you had some good looking clothes" (1 Tr. 10). Edwards did not move for a continuance because the trial judge immediately made it clear that "the Court is not going to delay the proceedings to do anything about it". Id. Edwards made it quite clear that "I would not like to be presiding [sic] in the courtroom with jailhouse clothes" and that "I think that would be a prejudicial factor to me" (1 Tr. 73). The trial court suggested, after a

day's trial, that perhaps Salvation Army clothing be obtained (Id.), but by then the petit jury had been empanelled and the damage done.[1]

Perhaps the most untenable contention by the State is that Edwards invited error justifying the prosecutor's pointed, repeated comment on his failure to testify. It is said to have been an elaborate bootstrap affair by which he gave testimony while personally interrogating witnesses, instead of asking questions; and then used his summation to personally avow his innocence. Upon examination of the record, the whole theory comes apart.

For example, the State says (Response, p. 9) that Edwards brought out for the first time on cross-examination of the eyewitness the fact that the perpetrators were black -- but omits to mention that the matter came from a prior statement of the witness, and that Edwards was using the statement because it pointed up a discrepancy in the number of supposed participants. The State says (Response, p. 10) that Edwards in effect gave testimony, while questioning the accomplice. But a reading of the cited transcript referred (R. T. April 21, 1977, pp. 173, 178, 179) shows a normal cross-examination by leading questions, and not the giving of testimony.

Similarly, Edwards' summation was exactly what a lawyer would have done on his behalf. He discussed the evidence and drew inferences from it -- only referring to himself as "I" instead of as "my client". Appended to this Reply is an extract of page 12 of the Response, setting forth the State's contention that Edwards' summation was a personal avowal of innocence based upon facts he had supposedly "provided to the jury while questioning his [alibi] witness" (Response, p. 12). Also

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1 The State suggests (Response, p. 16) that the prison garb issue may not be ripe for determination by this Court because of the possibility of post-conviction proceedings under Arizona Rules of Criminal Procedure 32. It does not mention that such review seems barred by Ariz. R. Crim. P. 32.2 precluding issues adjudicated on direct appeal.

appended are copies of the transcript pages to which the State referred, which demonstrates that Edwards took no liberties with the record, and made no personal statements. The "invited error" theory cannot be allowed to preclude this Court's review of the egregious Fifth Amendment issue presented by the prosecutor's comment on Edwards' silence.

The State is also incorrect in characterizing as uniform the state of the law on reinterrogation after request for a lawyer. It contends that among the courts that have discussed the issue, there is agreement that there is no per se rule to prohibit further contact with an accused after he has indicated that he wishes to consult with an attorney prior to questioning. It should be noted that none of the cases cited on page 14 of the Response concern issues like that raised here. For example, United States v. Hauck, 586 F.2d 1296 (8th Cir. 1978); and United States v. Rodriguez-Gastellum, 569 F.2d 482 (9th Cir. en banc) cert. denied, 436 U.S. 919 (1978), involved explicit waiver of the presence of counsel:

> "The defendant then said retaining an attorney seemed like too much trouble and proceeded with the interview." Hauck, supra, 586 F.2d at 1297.

> "But in this case it is undisputed that there was no badgering, pressure or coercion. The waiver was explicit, clear and unequivocal." Rodriguez, supra, 569 F.2d at 488.

In this case the issue on waiver is whether one can be implied by total silence as to the request for a lawyer. As was said in a case cited by the Respondent, United States v. Charlton, 565 F.2d 86 ((6th Cir. 1977):

> "[T]he mere demonstration that the confession came without objection after resumption of questioning is inadequate evidence of waiver." 565 F.2d at 91.

It is evident from the cases cited by the Response that there is a split among the Circuits over what type of reinterrogation, if any, is proper after an accused asks to see a lawyer. For instance, the response

cites White v. Finkbeiner, 570 F.2d 194 (7th Cir., 1978), for the proposition that there is no per se rule prohibiting further contact. In fact, the 7th Circuit said in that decision that it adheres to the rule that an accused's right to the assistance of counsel can never be waived by a suspect whose initial request has been refused. It did not rule on this issue, but remanded for a further determination of whether the accused had in fact requested the assistance of counsel. However, the court stated:

> "In Miranda the Court appears to have set out a per se rule barring any custodial interrogation of a suspect after a request for counsel has been made. The Court said:
>
> > 'If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.' 384 U.S. at 474, 86 S. Ct. at 1628 (emphasis added).
>
> "In Williams, at least, we have construed the Court's above remarks as requiring the suppression of any statement obtained after a request for counsel had been made and not yet honored. See, 476 F.2d at 1252.
>
> "Nothing in Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), appears to require a retreat from that view. Mosley is distinguishable from the case before us because here, unlike in Mosley, the petitioner has alleged that he not only invoked his right to remain silent during his first custodial interrogation, but also asked to see an attorney. See, 423 U.S. at 101 n.7, 96 S. Ct. 321. As Mr. Justice White noted in his concurrence to Mosley,
>
> > 'the reason to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point,

> the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.' 423 U.S. at 110 n.2, 96 S. Ct. 329." White v. Finkbeiner, 570 F.2d at 200, n. 1.

The confession would also be inadmissible under the criteria used by the 4th Circuit in United States v. Grant, 549 F.2d 942 (1977). Although the court held the confession admissible, Grant confessed after being asked only standard identification information. The court said:

> "It does not follow, though, that Miranda erects an absolute per se bar on any conversation with the accused by the investigating officers after the former has requested counsel. It only inhibits investigative interrogation related to the specific crime itself." 549 F.2d at 946.

Thus, the court recognized that a confession can't be used when elicited by investigatory interrogation, after the right to the assistance of counsel has been invoked as was done in the case at hand. That is precisely what occurred here, contrary to what occurred in Grant.

The Respondent attempts to distinguish Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) (en banc) on the grounds that there was a temporal break between the request for counsel and the purported waiver. This interpretation is unwarranted. The court in Nash, was concerned with a situation where the suspect's desires were expressed in such an equivocal fashion that it was permissible for the questioning officer to make further inquiry to clarify the suspect's wishes. Here, the Petitioner's wishes were clear from the beginning and needed no clarification. As the trial court found, he wanted the presence of an attorney, and he never communicated any contrary desire.

It is apparent, from both the Petition and Response, that the Courts of Appeals cannot agree on whether there is a per se rule that

prohibits all or any contact with an accused after he has asked for the assistance of counsel.

The Respondent also points out that the Court has granted certiorari in State v. Innis, ____ R.I. ____, 391 A.2d 1158 (1978), cert. granted, 440 U.S. 934 (1979). This does not prevent the granting of certiorari in the case at hand because in Innis the decision was entirely on Fifth Amendment grounds, whereas, this case is based on the Sixth as well as the Fifth Amendment. More to the point, however, is the situation so clearly presented here -- when an accused asks for a lawyer; cannot afford one; and will in the normal course be appointed one within hours. Can the police conduct a reinterrogation before counsel is appointed, which is timed and intended to occur before the accused gets the legal advice he wants? If so, does the mere regiving of the Miranda warning support a waiver of the original request for a lawyer? Such a case is not presented by Innis, which instead questions whether there was any interrogation. Here, there was.

We respectfully request this Court to see through the illusory factual complications thrown up by the State of Arizona, and to grant certiorari.

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Of Counsel

APPENDIX

EXTRACT FROM RESPONSE OF STATE OF ARIZONA, P. 12 AND TRANSCRIPT PAGES CITED THEREIN

After the state's attorney had concluded, Edwards wrote on the easel "Defendant did not confess". (Id. at 5-97, 5-166.) Edwards then argued to the jury that, because Marmion and Milne only gave testimony of an oral confession, and had no evidence of a written confession, the jury should take that to mean that Edwards did not confess, and should "take that into what we call consideration, into evidence." (Id. at 5-111, 5-127, 5-128.) Later, he said "[a]s you heard in my statement, I was at a party," referring to the taped statement. [That had been admitted into evidence and played to the jury.] (Id. at 5-115.) He then discussed his alibi explanation, many of the facts which he had provided to the jury while questioning his witness. (Id. at 5-115 to 5-116; 5-40 to 5-42, 5-45 to 5-46, 5-48.) he again told the jury that his defense was that he was not there at the time. (Id. at 5-118, 5-134 to 5-135.) He made further references to statements he had made and explanations he had made, and denied making the confession of January 20, 1976. (Id. at 5-124, 5-126 to 5-128.)

Q Was you knowing me that year 1974?

A Yeah.

Q Do you know approximately, Miss Williams, of the incident that happened -- remember not the date explicitly because you say you don't remember the date because it's been a long time.

A Yeah.

Q Now, do you remember a date of a party that supposed to happen on the south side in that month?

A No.

Q Do you remember coming over to the south side, Mrs. Williams, in that time and picking any person up?

A Well, I don't know when it was.

Q Who did you pick up?

A I came to get you sure enough, but, you know, I don't know.

Q Was it a party going on when you came to pick me up that month?

A I didn't get out.

Q Is that across from the V.F.W.?

A Project.

Q Did you take me home, did you take me home or was anybody else with us when we left?

A No, I -- no.

Q All right. Where did you stay then, Mrs. Williams?

A On University.

Q That was on the north side, am I correct?

A That was Third and Queen.

Q Third and Queen. That time that you supposedly pick -- when you picked me up that date, Mrs. Williams, you don't remember what date it was, but you remember the party, you remember me going anyplace when we got to the house?

A I remember picking you up a couple of times. That's why I don't know. Once you got in, no, unless to the store or something.

Q I'm asking you a question. Do you remember me that time you pick me up at the party, do you remember me going anyplace?

You don't remember the dates, it's been so long. Do you remember me leaving the house, somebody coming over?

A No.

Q Do you remember anybody coming over during that night?

A It's been a long time, you know. I -- I don't know. I can't just say.

Q Who was there, Mrs. Williams, do you remember that?

A At my house?

Q Yes, at that time that we went home, who was there? Was there more people in your house, was it just me and you or who was there?

A Yes. You and myself and I guess my two daughters.

Q Did anybody come over at one o'clock that morning or two or three, did anybody come over late in the night, as late as one or two in the morning? Did anybody show that night, anybody, can you remember that?

A (Witness shakes head.)

Q Can you remember going to work that morning?

MR. LINGEMAN: Your Honor, could we have a date or time or some idea of when we are talking about? There is no foundation.

THE COURT: Well, the record to date may stand.

There is no question pending. You may ask another question.

MR. EDWARDS: Your Honor ----

THE COURT: She answered your last question and I'm leaving the answer in the record.

MR. EDWARDS: Oh.

THE COURT: Do you want the last question

Q You don't remember?

A (Witness shakes head.)

Q When I was staying with you in October of 1974, Mrs. Williams, did I ever mention to you or you say that time you picked me up at a party and took me home, did I ever mention to you, Mrs. Williams, that -- that I was in any kind of robbery or that I was, you know, did you ever know that I was in any kind of a robbery or murder or anything to that involvement?

A That night, no, you never told me nothing.

Q Did I tell you or did anybody else tell you?

A No.

Q Did you know -- did you have a doubt in your mind that I was any kind of involved in any robbery, any murder?

A Oh, I guess it never even crossed my mind something like that. I just went to pick you up at a party, but I always picked you up every night from somewhere.

Q And when you picked me up that night, you remember when you picked me up October that night?

A I don't know what night. I don't know.

Q You just know it was October, Mrs. Williams?

A No.

Q Well, when you picked me up you don't remember the date, when you picked me up, Mrs. Williams, in that month, I can say that you don't remember what date, but can I say did I ever leave the house, do you remember that?

A I don't know.

Q Did I ever leave, did I ever leave the house? Did I ever go out, do you remember that?

A If you ever went out anyplace at all?

Q When I went home, when you picked me up that night, did I ever leave the house? Did I go anywhere?

A I don't know.

Q Mrs. Williams, this is where you have to tell specific remember the dates, remember the time.

I think you testified in here, you remember the time and date in October.

A I did.

Q Yes, you did. Before you testified again you recall the time and you recall the date.

A No, no time.

Q You don't remember testifying before

MR. LINGEMAN: Your Honor, that question has been asked and answered many times.

THE COURT: Overruled.

THE WITNESS: Do I remember October '74?

Q (By Mr. Edwards) Yes.

A Yes, I remember October '74.

Q No date in October '74.

A No, I don't, no. No, I ----

Q Would you say that all you testified on the stand here is you remember picking me up at a party in October of '74; is that correct?

A It was one of those years. It must have been back in that time somewhere.

Q Across from the V.F.W. that you testified to?

A It was a project ----

Q Is that ----

A -- beside of the park.

Q You have -- on the south side, north, east, west, what side?

A It was some project right across from the V.F.W., right across the street right over there.

Q Mrs. Williams, something puzzles me here.

You testified, Mrs. Williams, that

attention and I ask you to do that because he is not an attorney.

When you do that, keep that in mind and make him tell you that and make him tell you what evidence has been introduced in this case, what has been produced in this courtroom to refute that.

He has confessed to the armed robbery and the armed burglary, and under the law the Court will give you, he has committed the murder. You have to understand the law if you are to follow your oaths. The law that I have just read to you. You have to find him guilty of all three offenses unless you believe that Mr. Mungia died of something else, that this wasn't the cause of his death. There is just no evidence to support that.

Thank you, very much.

THE COURT: Mr. Edwards, you may make the closing argument.

(Whereupon, Mr. Edwards goes to the easel and writes the following: "Defendant did not confess.")

Ladies and gentlemen of the jury, I thank you for being patient and considerate and listening to this case.

...ed in the statement he introduce it from his mind after he has talked to me and made a transcript of the statement.

He never presented the statement. They never presented anything to what a man wrote up his self on a piece of paper and then he says I was involved in the crime.

You must take the statement of two. The statements of evidence that are presented to you. Must take the evidence that are presented to you, ladies and gentlemens.

The evidence that you heard from my own voice, that you heard on tape, that you heard with voluntarily made, you must take that all because it was presented as evidence.

And then you must take, and then the statement that the police alleged against me was not on tape, was -- was not anywhere, but not what you call from mine, what I wrote up his self. Wrote it himself.

Ladies and gentlemens, you must take that into what we call into consideration, into evidence.

Now, we get on what we can say the State produced one more witness in this case. The State produced a witness that was named, I

gentlemens, not consumptions, but we are talking about facts.

You must base law on fact, not opinion and theories.

Now, you seen the whereabouts when Mrs. Williams came on the stand and she testified. The lady didn't remember what date it was. Mrs. Williams didn't remember.

She remembered the month because three years had been a long time to remember the specific date, to remember what time was she -- she said she remembered that month.

As you heard in my statement, I was at a party. You heard that this same woman, this same young lady, Mrs. Williams, come and got me.

She said as she come and got me we went home. As we went home you heard me cross-examine this witness, Mrs. Williams, and ask her did I ever leave. She said no.

And did I ever go anywhere? She remembers -- she do not remember the date, but you heard my statement and it was the same date, October 9th of 1976, and she testified to that and the only time she remember was from the same thing a party across from the V.F.W. on the south

side that she come and pick me up and we went home and I never left the place. The crime was supposed to happen that night, but I was there.

She testified to that and she testified to the fact that I was there and no one came over. I didn't even know where.

You must take her testimony under consideration and under evidence she testified.

Now, ladies and gentlemens of the jury, I must talk to you about a person, a person of what we call a felony-murder rule.

A felony-murder rule is when a person dies it's considered murder.

A crime have to be committed and a person must die and this is considered murder.

But, you see, that never -- and never reasonable, what we call a reasonable doubt.

It was a reasonable doubt in that because the State never proved that the man died at the scene of the crime.

The only one can tell you that the person died at that scene of the crime was the man himself. And he was what we call died.

You have to realize that Mrs. Esparza who was a waitress at the bar, she said the man, after he was supposedly robbed, got up

consider that something accidentally or anything might happen because you know and you're going to do a crime.

But then you have to realize it's the evidence shown that a man is supposedly committed a crime has put on evidence was -- he was not involved in the crime.

My defense was not alleged of a withdrawal defense. My defense was alleged that I was not there at the time. I did not cause death or no armed robbery or no burglary. This was my defense.

I tried to put my defense as possible as I know how.

Like the district attorney said, I'm not a lawyer. No, I'm not a lawyer. I have attorney, but I'm defending myself. Yes, I am. I'm defending myself because -- and then I have a reason to defend myself.

I have a reason to defend myself, is my possibility because then I know that I can tell or I can explain, but what -- what's the reason, the truth to you. I can never say that I can get up and perform to you like a attorney. You must understand. You must bear with me that everything I can explain to you that you must

Only one thing that credit, and you must weigh as evidence, as evidence must be weighed that you must understand the evidence and the evidence you must weigh are not only one side of the facts, you must weigh all the facts. You must weigh the State and you must weigh the defense. You weigh all the facts. You must under all the facts that been presented to you.

And you must understand that a reasonable doubt of the man is innocent of what they commit a man or try to allege a man of a crime that is being committed.

A witness stated here today to you, it was on the stand, a witness that came forth and I presented as well as the State presented.

They presented a statement to you first and this statement, what they call was a alibi. You heard the whole alibi statement, but what I call it was the whereabouts statement.

A person that testified that you heard of Williams' trial, you heard of Soto, and you heard these people. These peoples' names in this trial.

You heard a Mrs. Delores Williams, that she got on the stand. You seen the lady. You seen this lady was very nervous because she

SUPERIOR COURT. PIMA COU

That's all he's got, but all the defendant presented to you, you seen the statement presented to you, you seen the statement voluntary made, the statement of my whereabouts, where I was with the same Delores Williams that came up on the stand.

I had left her and was arrested 20 minutes after that and the police never went back to her to follow my story. Never did.

And when Sgt. Bunting, when he left he said that I did not say I was involved and they had time enough to go over there and to know that she was there, but they never did.

Then they wait until 1977. The only thing -- the only thing that the prosecution can turn, that he talk about presented confession, he never permitted that anywhere that the police report that came to you was in evidence. A police report came to you in evidence that Mr. Marmion -- Mr. Marmion was a police that supposed to obtain the next day, that he told -- that he told you when I left that I asked for a attorney.

He told you that when I left, Bunting was on the stand, that then I was carry to jail. Then I explained that I was taken to confinement and I was brought out of confinement

the next day.

That a police officer, Marmion, came down to talk to me and that's when he talked to me he said he played a state -- a tapement (sic) of Mr. Reed's.

He said then that -- that after he played a statement to Mr. Reed, then I said, "I do not want this tape because it can be used against me."

And then he said that then he -- I told him my involvement in the case. And then he wrote it up. Then he left and he put it on tape.

But, you see, ladies and gentlemens of the jury, that it was never brought to you on tape. He said that then as he wrote it up, ladies and gentlemens, he used one thing because he had to use this thing, it was not used against me on tape. He had to because then if a man has enough intelligence, ladies and gentlemens of the jury, to be telling the truth, he do not involve his self. He do not involve what we call put his self in a position that he is telling the truth. He don't care if he is intelligent enough to make a taped statement to produce to you.

I came back again. The police

officer, that's the only thing they could do, to call themselves to present a case to you. Does the man come back and say, "I have a confession. I have a confession that he stated to you"?

Marmion. I remembered it from my mind because I copied it down.

I said it to you. I said it, but it was on tape. But the police officers come at the jail house and say I say something verbally. And then he wrote that down. And he transcribed it and put it on tape, but you never told it was involuntary and he never told it was on tape or nothing like that.

The statement must be involuntary (sic).

Ladies and gentlemens of the jury, you must consider all of this evidence that is brought in to you. You must consider this evidence because you are the judges in this case.

You judge -- youre judges of what I'm saying in the terms that you judge all the evidence, but as I know that I'm not a attorney at law, and I know that people of the jury not attorney at -- any kind of law, and any kind of a degree, but they must understand that the

In that time or that place or that position that this is the man, that man, them type of people.

I'm just a mens, a human being. Sure enough I'm a black man, but judge me, ladies and gentlemens, as the evidence has presented to you, not a person accusations that the D.A. presented to you, but judge me as a human being and as all the evidence that has been presented.

And because of these reasons, ladies and gentlemen of the jury, that all the evidence I have presented to you as well as the State, you weigh this evidence that I put on my defense. Police officer, witnesses of credibility and my whereabouts. This was my defense.

And then the defense that the State has put on and the only defense he could put on, because he did not weigh the evidence that he had, he had what we call evidence of what he could drive to you was a statement. And the statement was, he could drive to you, was that a man said he was involved. A man say he was involved in a crime.

But, ladies and gentlemens of the jury, me, I'm saying I wasn't involved in no crime. I did not participate. I did not aid

and abet and I did not participate in no crime.

I'm saying to you I'm innocent of these charges they have towards me because innocent lies on the basis I have presented to you, the fingerprints. That is a factual basis. A basis that produces evidence and you must weigh that. Eyewitnesses evidence. You must weigh all of them facts.

And people. Eyewitnesses have told the police at the scene of the crim all of the evidence. And the credibility of what a person consider or what a person can say of everytime a dominating thing. Look around and it's a dominating factor in this case.

And as I stand here today to you, ladies and gentlemens of the jury, I stand with you as to explain, as I told you before, I'm not attorney at law, but explain to you that my defense -- and my defense is my innocence as well as I can explain. That's why, like I told you, this is a serious case. This is a very serious case. You must hear and understand the things that are alleged in this crime and all the evidence, and because a man sits here to explain to you the evidence that has been presented.

The only way I can explain to you

MR. LINGEMAN: No.

THE COURT: All right. It's five minutes to six and I'm going to have the bailiff take the jury out to dinner and I'm going to take this request and your record that you just made under advisement and meet back here at seven thirty this evening and make a ruling on it.

I am going to send a written note back to the jury. Will you take this down and type it: "I have your question. I'm not able to answer the question for you until -- I'm not able to answer the question for you at this time. I am going to send you out to dinner with the bailiff and when you return from dinner I will have an answer for your question shortly."

Now, there is one other thing I want to put on the record.

I am going to have these marked as Court's exhibits, not to go to the jury.

The first one is what Mr. Lingeman wrote commencing his closing argument and it says the defendant confessed. It will be marked Court's Exhibit No. 1.

And the second one is what the defendant wrote commencing his closing argument. "The defendant did not confess." That will be

Supreme Court, U. S.
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No. 79-5269

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT EDWARDS, *Petitioner,*

v.

THE STATE OF ARIZONA, *Respondent.*

On Writ Of Certiorari To The Arizona Supreme Court

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Whether the Fifth, Sixth and Fourteenth Amendments require suppression of a post-arrest confession, which was obtained after Edwards had asked to consult counsel before further interrogation; which resulted from a jail house interrogation that Edwards objected to but was compelled to attend after being held incommunicado; and where the interrogation was instigated by the detectives who timed the questioning to occur just hours before they knew he was to be provided appointed counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5269

ROBERT EDWARDS, *Petitioner,*

v.

THE STATE OF ARIZONA, *Respondent.*

On Writ Of Certiorari To The Arizona Supreme Court

BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS IN THE LOWER COURTS

The opinion of the Arizona Supreme Court is reported as *State* v. *Edwards*, 122 Ariz. 206, 594 P.2d 72 (1979).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), from a judgment of the Arizona Supreme Court entered on March 27, 1979. A timely Motion for Rehearing was denied by the Arizona Supreme Court on May 2, 1979. On 18 July 1979, Mr. Justice Stevens entered an order under this Court's Docket No. A-48, extending the time for filing the Petition for Writ of Certiorari to and including August 29, 1979. On July 20, 1979, the Pima County, Arizona, Superior Court entered judgment pursuant to the Arizona Supreme Court opinion, setting aside the sentence of death it had previously imposed upon Petitioner, and imposing a sentence of life imprisonment upon him. A timely Petition for Writ of Certiorari was filed on August 28, 1979.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment XIV: " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law, . . ."

Amendment V: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

AmendmentVI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

In October 1974, the "La Conga" bar in Tucson, Arizona, was robbed at gunpoint, just as the proprietor and a (bar maid) were closing for the evening. The proprietor, 74 years old, suffered a fatal heart attack during the robbery. Petitioner Robert Edwards was one of four individuals implicated by a felon and heroin user named Cleveland Reed, who was apprehended during 1975 by the Tucson police on other criminal charges and given complete immunity from all prosecution related to the La Conga bar incident. Edwards, a twenty-four year old indigent black, was arrested on January 19, 1976, under authority of a criminal complaint and an arrest warrant charging him with murder, burglary and robbery. Edwards was ultimately convicted of first degree felony murder, as well as burglary and robbery. He was first sentenced to death, but later given life imprisonment.[1] One co-defendant was similarly convicted and sentenced, while another was acquitted of felony murder by a jury, and convicted of the burglary and robbery charges. Cleveland Reed, of course, went completely free.

After Edwards' arrest on January 19, 1976, he was taken to the Tucson Police Station, and read his *Miranda* rights, which he said he understood (J.A. 71).[2] He

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[1] The change in sentence was a result of the Arizona Supreme Court, in *State* v. *Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), applying the decisions of this Court in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Bell* v. *Ohio*, 438 U.S. 637 (1978), to invalidate certain portions of the Arizona death sentencing statute.

[2] Reference to the Joint Appendix is by "J.A." followed by particular page numbers.

was interrogated over a period of about three hours by Police Detective Sergeant Bunting and two other officers (J.A. 149). The interrogation was for trial preparation purposes, not to "solve" the case or for investigative reasons. Bunting wanted to "obtain a statement to be used in court . . . against him." (J.A. 39-40).

Bunting told Edwards the allegations that Reed and Soto, another accused, had made against him (J.A. 38).[3] Edwards then gave an alibi statement, which was tape recorded and ultimately received in evidence at his trial. He then spoke with the detectives about making a deal, "if it will help him" (J.A. 39). He spoke briefly to a prosecuting attorney by telephone and then said that he would wait to make a deal until he had spoken to an attorney. As Sergeant Bunting testified, Edwards said, "I'm going to wait until I get an attorney to make a deal for me. I'm not going to make a deal now. I'm not going to make a statement now. I'm going to wait until I get my attorney."(J.A. 151.) After he and Edwards went "back and forth" on this subject (J.A. 40), Bunting then terminated his interrogation.

The trial judge concluded that the statements by Edwards on the evening of his arrest constituted a claim of the right to consult counsel before making any statements. On appeal, the Arizona Supreme Court agreed that Edwards had invoked his rights to remain silent and to consult with counsel before breaking his silence. The Arizona Supreme Court said, "[L]ooking at

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[3] Some police officers' testimony, including that just referenced, used the name "Barefield" in speaking about Petitioner.

Edwards' statement in the context made, that . . . it must be interpreted as a request for counsel and as a request to remain silent until counsel was present." 594 P.2d at 77 (J.A. 16).

Edwards was taken from the police station to the jail, where he was held in isolation overnight. Edwards described it as "solitary . . . a hole with slats in it" (J.A. 76). The next morning, a jail detention officer told Edwards that detectives were there to see him. Edwards said, "I refused to come out of the hole . . . I told them I didn't want to talk to nobody." (J.A. 77.) But the detention officer "told me I had to talk to him". *(ibid.)* Edwards was thereupon taken to a small, windowless interview room in the interior of the County Jail where Detectives Marmion and Milne were waiting to question him.

These detectives worked for Detective Bunting, who had questioned Edwards the day before. They said they did not know that he had made the statement about an attorney, although Milne knew Edwards had been interrogated and "assumed he didn't want to give a statement at that time" (J.A. 65). Bunting, to whom Edwards had made the request for counsel, had instructed Detective Milne to go the jail to interview Edwards (J.A. 96),[4] although he did not tell Milne of the prior

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[4] This fact did not come to light at the pretrial motion to suppress, but was admitted by Milne at Edwards' first trial (J.A. 96). Bunting denied it, but it makes no difference because the interrogating police are charged with Bunting's knowledge. See note 24, *infra*.

rogation and request for counsel. They knew that an attorney would not be appointed for him until the afternoon. In Arizona, persons arrested on warrants issued upon a felony complaint are brought before a magistrate, and indigents like Edwards are assigned to the public defender, or appointed counsel, at that time (J.A. 42). The interrogating Detective Marmion and his supervisor, Bunting, were aware of this and that Edwards' first appearance would occur at 1:30 p.m. after Marmion had interrogated him (J.A. 42, 135-136).

As had been true of the evening before, the interrogation was for use at trial, not for investigative purposes. Marmion went out to the jail "to see what [Edwards] was going to tell me on that particular day" (J.A. 51), and Milne was sent along to be "a witness to any statements that he made" (J.A. 68).

Edwards was read his *Miranda* rights at the jail interrogation. He told Marmion that he didn't yet have an attorney (J.A. 52). When asked at the supression hearing before trial why he had not once again told these detectives that he wanted an attorney, he responded, "I didn't think you had to keep asking for an attorney over and over and over." (J.A. 84.) According to the detectives, whose testimony was credited by the trial court, Edwards asked to hear the taped statements of Soto, another of the accused, and some nine minutes or more of the Soto tape recording was played to him. Edwards then said he would tell the detectives what heppened but would not give a taped statement (J.A. 123). Edwards told Marmion he would not tape a statement because he

did not want the statement used against him in a court later (J.A. 54). Marmion responded, "Big deal. There are two of us. We can testify about it." Edwards said, "No, I don't want to give one." (J.A. 54.) But then he made inculpatory statements, in which he described for the detectives how the robbery was planned and carried out. He said that he had gone into the bar, kept watch over the barmaid during the robbery, and overheard Cleveland Reed fire two shots, which apparently did not strike anyone. He took the barmaid into the office of the bar, where Reed and the bar owner were, and watched as Reed took money and some other articles of property. Then the two of them, with the others, fled (J.A. 124-125).

After leaving the interrogation room, Detective Marmion tape recorded his recollections of the interview, which he erased after preparing a standard written report of the interrogation. On the afternoon of the day that he had been interrogated at the jail over his objections, Edwards was appointed counsel at his initial court appearance. Three or four days later, the detectives went back to the jail to attempt to obtain a statement, but he would not give one (J.A. 128).

At a hearing before trial, the court initially suppressed the confession, holding that Edwards had exercised his rights to remain silent and to have advice of counsel before making any statements, and that this decision had not been scrupulously honored by the police (J.A. 92). The court felt it was significant that the detectives knew that Edwards was about to be provided

appointed counsel, and also that the detectives, and not Edwards, initiated the interrogation. Three days later, the court changed its mind, on the basis of an Arizona opinion that had not been earlier cited to it,[5] and concluded that this Court's opinion in *Michigan* v. *Mosley,* 423 U.S. 96 (1975), permitted the police conduct that obtained the confession (J.A. 95). The court concluded that Edwards' statement at the jail had been voluntary (J.A. 91, 95), but did not find that Edwards had waived his Fifth and Sixth Amendment rights.

It took two trials to convict Edwards, there having been one mistrial when the jurors could not reach a verdict. At his second trial, Marmion and Milne testified to the incriminating statements made by Edwards, as they had at his first trial (J.A. 124,142). Edwards did not testify, but in the final argument urged the jury to find that he had not confessed.[6]

On appeal, Edwards reasserted his Fifth and Sixth Amendment claims, which had first been raised at the pretrial suppression hearing, that the confession should have been suppressed. As has been noted, the Arizona Supreme Court agreed that, on the evening of his arrest, Edwards had invoked his rights to remain silent and to have counsel before making further statements. Over dissent, however, it concluded that Edwards' *Miranda* rights and his Sixth Amendment rights were honored. It concluded that the "totality of circumstances" volun-

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[5] *State* v. *Travis*, 26 Ariz. App. 24, 545 P.2d 986 (1976).

[6] With the aid of advisory counsel, Edwards conductd much of his own defense.

tariness test of *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973), applied and was satisifed. It therefore held that the confession was properly admitted (J.A. 18-19).

SUMMARY OF ARGUMENT

This case depends upon four critical facts. First, when Robert Edwards was arrested, the police thought this case to have been solved. They were not investigating when they interrogated him, but instead were seeking evidence usable in court. Secondly, the police interrogations under consideration occurred after the State of Arizona had formally begun prosecution of Edwards. A complaint had been filed which, under Arizona law, was one of two ways of formally commencing a felony prosecution. Thus, this case must be determined under those rules that apply where a prosecution is ongoing, and the responsibility of the courts to insure a fair trial has begun. Third, as both the trial court and the Arizona Supreme Court found, Edwards did ask to be afforded counsel on the evening of his arrest. Thus, that part of the doctrine of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was invoked which imposes stricter burdens upon the State, when an accused has asked for counsel. Finally, after Edwards had been jailed overnight, his interrogation the next day was initiated by the police who knew that he would shortly get a lawyer. Edwards did not want to talk to the police.

The following argument analyzes three constitutional guaranties that were involved in this case, in a somewhat parallel manner but derived from separate

portions of the Constitution. If properly applied in this case, each of them independently prohibits the reception of this confession into evidence and precludes an argument that Edwards waived his Fifth, Sixth and Fourteenth Amendment rights by acquiescing to the State' request to talk with the detectives. The final section of the argument deals with the issue of waiver, if that is necessary.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court established a flat prohibition against further questioning of an accused who is in custody, if he asks for the assistance of counsel. The unqualified nature of such a rule has been reiterated by this Court in later cases. The better reasoned cases from the Courts of Appeal and the state courts also impose such a flat rule against the police reinterrogating a suspect who has asked for counsel but not yet received it. Where an accused in custody has asked for counsel, he has recognized that he needs help in dealing with the authorities and, therefore, the need for protecting the privilege against self-incrimination discussed in *Miranda* and succeeding cases is greater because of the acknowledged vulnerability of this particular accused who has asked for a lawyer. In addition, at least in cases like this one where the interrogation is for use at trial, and not to solve the crime, any hardship or inconvenience to the law authorities is minimal, if such inconvenience is relevant. All that need occur is for the police to leave the accused alone for several hours or a day or so, until he can consult with counsel. In any event, this case only seeks such a rule

against interrogations initiated by the police. Under proper circumstances, where an accused changes his mind after asking for a lawyer, reinterrogations may be permitted. That situation is not here at issue.

Secondly, Petitioner had a Sixth Amendment right to the assistance of counsel which arose by virtue of the fact that criminal prosecution had commenced against him. Thus, his interrogation was a critical pretrial stage, for which he was entitled to a lawyer's assistance. Petitioner's need for a lawyer was especially great in this case because one possibility that was available to Edwards was plea bargaining. Before Edwards could obtain his counsel and attempt such bargaining, however, the intentional interrogation by the detectives had obtained what they would other wise have been bargaining for, his confession usable in court. This case is very similar to *Brewer* v. *Williams,* 430 U.S. 387 (1977), except that in *Brewer* the accused had already consulted with counsel. Here, Edwards had not. Far from that being a ground not to find that the right to counsel had attached and was violated, it is all the more reason to hold that the interrogation by the police at the county jail violated Edwards' right to counsel.

A third constitutional violation stems from the fact that the police intentionally reinterrogated Edwards before he could obtain appointed counsel. Where the interrogation is carried out after the commencement of prosecution, the due process clause applies with greater force, to insure that the accused receives fundamental fairness in all aspects of a trial and in all pretrial critical

stages. Most courts conclude that the deliberate interrogation of an accused without telling his counsel is improper and unethical. Others find it to be grounds for excluding his confession. The pervasive disapproval of such interrogations, at least where the accused has not requested to speak to law officers, demonstrates the widespread recognition of unfairness which makes out a violation of the due process clause of the Fourteenth Amendment. Thus, just as the State may not knowingly make use of perjured testimony, or knowingly fail to give a defendant favorable evidence, it may not carry out an interrogation after formal prosecution has begun, with all the potential for deception, psychological gamesmanship and trickery that normally is involved in such interrogations, unless defense counsel is given an opportunity to be present, assist the accused and even the stakes.

Finally, the record in this case will not support a waiver. To prove waiver of Sixth Amendment right to counsel, there must be a very high showing of the intentional relinquishment of a known right; that it was expressly waived. The burden of proving that an accused has given up the right to counsel is the same high standard as for establishing that other constitutional rights affecting the fairness of a trial, such as the right to a jury or to confront the witnesses against him were waived. There is nothing in the record from which such a waiver could be adduced. The same test should apply to determine whether a waiver of the *Miranda* rights occured, inasmuch as Edwards had claimed his right to

counsel. Even if that is not the case, however, a voluntary waiver must be found, on all the circumstances, not including the fact that a statement was made. Taking away that fact, in this case, leaves only the facts that Edwards decided not to make a statement until he got a lawyer, that he told the detention officers at the Pima County Jail on the morning after his arrest that he did not want to speak with anyone, and that he told his interrogators he would not make a taped statement because he did not want it used against him in a court of law. These are not waiver facts.

Because of the violations of Edwards' Fifth, Sixth and Fourteenth Amendment rights of counsel, against compulsory self-incrimination and to receive due process, his confession should have been suppressed.

ARGUMENT

I. The Confession Should Have Been Excluded Because It Was Obtained In Violation Of The Fifth And Sixth Amendment Protections Elaborated In *Miranda* v. *Arizona.*

This case again involves this Court in determining whether police questioning of an accused in the secrecy of a jail has undercut the Petitioner's desire to claim his privilege against self-incrimination. Probably no constitutional problem has required so much of this Court's attention as that arising under the Fifth and Sixth Amendments when the police undertake, by secret interrogation, to obtain a confession so that a criminal conviction can be won.

In case after case, it has been established that coerced confessions are not to be permitted. *Culombe* v. *Connecticut,* 367 U.S. 568 (1961); *Brown* v. *Mississippi,* 297 U.S. 278 (1936). Involuntary confessions lack trustworthiness as evidence because the conditions under which they are obtained may be such as would compel an innocent person to incriminate himself. *Lisenba* v. *California,* 314 U.S. 219 (1941). By allowing the use of coerced confessions, courts lend judicial sanction to the illegal methods by which the statements were obtained. To do so would denigrate the esteem and respect which the judiciary must be accorded if it is to function effectively in a free society. *Townsend* v. *Sain,* 372 U.S. 293 (1963); *Blackburn* v. *Alabama,* 361 U.S. 199 (1960).

Coercion need not take the physical form of the rack, the rubber hose or the blackjack. Spirit and mind may be as effectively twisted to an interrogator's will as may the body. Psychological compulsion thus has received, no less than physical coercion, the reprobation it deserves. *Chambers* v. *Florida,* 309 U.S. 227 (1940). Mental and emotional coercion take many forms, the most common of which (incomunicado incarceration, Mutt and Jeff routines, physical and psychological isolation) are used frequently by police during custodial interrogation in an effort to secure admissions of guilt from criminal suspects.[7] Use of these techniques has been found to be so powerful as to inherently constitute coercion. But so frequently did such instances occur,

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[7] *See* F. Inbau and J. Reid *Criminal interrogation and Confessions* (2d ed. 1967); R. Aubrey and R. Caputo *Criminal Interrogation (1st ed. 1965).*

that in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), this Court concluded that, only by effectively warning suspects of their rights to silence and counsel under the Fifth and Sixth Amendments, and by scrupulously honoring any assertion of those rights, would the inherent compulsion of custodial interrogation be dissipated to the extent that statements made during such interrogation might safely be accepted as voluntary and admitted into evidence in a court of law. *Miranda, supra; Michigan* v. *Mosley, supra,* 423 U.S. 96 (1975). If a suspect is not afforded the protection mandated by this court, confessions are presumed coerced and inadmissible. *Id.* Here, Edwards sought to have the protection of counsel, but the detectives obtained their result before he could get it.

A. The presence of counsel is essential in the setting of custodial interrogation as a means of insuring that constitutional rights are respected.

Of special importance in the present case is the right to the presence of legal counsel during custodial interrogation. Through the free and unfettered exercise of this right, a criminally accused can mitigate the coercive influences inherent in custodial interrogation. *Miranda, supra; Escobedo* v. *Illinois,* 378 U.S. 478 (1964). An attorney can act as an observer, insuring that his client is treated within the limits imposed by the Constitution. He can also take a more active role as adversary for his client's interests, giving advice and assistance and assuring that an accused will not face alone the tremendous

powers of the state. *Fare* v. *Michael C.*, 442 U.S. 707 (1979).

Recognizing the pivotal role of counsel in our system of justice, this Court held in *Miranda* that a request for counsel by one undergoing custodial interrogation operates as an assertion of Fifth and Sixth Amendment rights and bars further questioning.

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. at 474.

A request for counsel is an acknowledgement by the accused that his position vis-a-vis the state is one of weakness,[8] and that he is unable or incompetent to make his own decisions. *Michigan* v. *Mosley*, 423 U.S. 96 (1975) (White, J., concurring); Case Note, 31 Vand. L. Rev. 1069 (1978). Mr. Justice White demonstrated in *Mosley* the analytical difference between an assertion of the right to silence and of the right to counsel. An assertion of the former can be interpreted as an affirmation of the suspect's willingness to conduct his relations with the police on his own. It is, therefore, proper that lines of communication be kept open, *Michigan* v. *Mosley*, 423 U.S. at 110, n. 2, so that authorities may ascertain if the defendant has chosen for himself a different course of action. This effectuates *Miranda*'s major premise that an individual should be free to make his

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[8] Edwards' case is instructive. He made an unsuccessful attempt to negotiate with the prosecution on his own, and then recognized that he needed a lawyer's help in dealing with the State. By the time he got it, the State had dealt with Edwards.

own decisions in the exercise of a free and rational intellect. *Id.*, at 110.

An assertion of the right to counsel, on the other hand, is evidence that the accused has already exercised his right of self-determination by deciding that he needs the assistance of a lawyer. Any necessity for keeping open lines of communication may be fulfilled in this situation by contacting the suspect's attorney, *id.*, and further questioning of the defendant is never required.[9]

B. A request for counsel must operate as an absolute bar to police-initiated reinterrogation, until counsel has been provided.

The specific issue to be resolved in the present case is what effect a suspect's assertion of the right to counsel must have upon future attempts to interrogate the suspect. This Court has indicated on several occasions that no further interrogation may take place. In arguing against a per se bar to interrogation following an assertion to the right to silence, Mr. Justice White noted:

> "The court showed [in *Miranda*] . . . that when it wanted to create a per se rule against further inter-

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[9] This is not to say that, simply because a suspect has asserted his right to silence but not to counsel, the police may badger the accused until a confession is obtained. Authorities must scrupulously honor a suspect's decision not to speak, *Michigan* v. *Mosley, supra,* and some courts have applied as stringent a bar to further interrogations in such circumstances as if the suspect had requested counsel. *United States* v. *Crisp,* 435 F.2d 354 (7th Cir. 1970), *cert. denied,* 402 U.S. 947 (1971); *People* v. *Superior Court of Marin County,* 118 Cal. Rptr. 617, 530 P.2d 585 (1975)

> rogation after assertion of a right, it knew how to do so. The Court . . . said 'if the individual states that he wants an attorney the interrogation must cease *until an attorney is present.' Miranda* v. *Arizona,* 384 U.S. at 474 (1966)." *Michigan* v. *Mosely*, 423 U.S. 96, 109 (1975) (White, J., concurring) (emphasis in original).

Further support for the proposition that no interrogation may take place is found in *Fare* v. *Michael C.*, 442 U.S. 707 (1979). Defendent, a juvenile, had requested, after his arrest, to speak with his probation officer. This request was denied by the police, and defendant argued that his request had been the functional equivalent of an assertion of his Fifth Amendment rights. This Court rejected that contention, noting the unique position occupied by attorneys.

> "The per se aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversarial system of criminal justice in this country. . . . For this reason, the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." 442 U.S. at 719.

Accord, State v. *Nash,* 407 A.2d 365 (N.H. 1979).

The lower Federal courts and the courts of various states have adopted three different positions on what the authorities may do once an accused, in custody, asks for a lawyer after being given *Miranda* warnings. Some courts bar or greatly restrict the ability of the police to engage in further interrogation following an assertion of

a suspect's constitutional rights, in effect adopting a strict per se approach. Some courts, while expressing approval of a per se rule, generally allow defendant-initiated interrogation sessions.[10] Finally, some courts have adopted a case-by-case analysis in determining the validity of a waiver and do not attach any special import to the suspect's initial request for counsel.

United States v. *Priest*, 409 F.2d 491 (5th Cir. 1969), is a leading example of a flat prohibition against reinterrogation. There, defendant was interrogated by an agent of the Federal Bureau of Investigation while in the hospital. He was advised of his rights and asked to sign the FBI's standard waiver form. This he refused to do until he had consulted a lawyer. Ingnoring his request, the FBI agent forged ahead with the interrogation until he had obtained a confession. The court held that there can be no waiver of counsel following a request for one.

> "Where there is a request for an attorney prior to any questioning, as in this case, a finding of knowing and intelligent waiver of the right to an attorney is impossible." 409 F.2d at 493.

This holding is based on the explicit language in *Miran-*

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[10] The record in this case illustrates, and the Arizona Supreme Court so found, that Edwards had no part in the initiation of the interrogation session which resulted in his confession. 122 Ariz. at 209. Therefore, whether the rule is that "post-assertion" interrogation is totally barred or is barred unless the defendant initiates the conversation, Edwards' statements would still be inadmissible.

da which seems to create such a per se barrier to post-assertion interrogation.[11]

The Fifth Circuit recently reaffirmed its holding in *Priest*. Before it was a case in which a defendant was arrested and incarcerated on murder charges. When he was interrogated by the police on these charges, the defendant made a request for the presence of his lawyer. This request was met with the rejoinder that his lawyer would not permit him to tell his side of the story. The interrogation was continued and resulted in a confession. The court held that the police had violated the "per se rule . . . that requires all custodial interrogation to cease once the suspect asks for an attorney." *Thompson* v. *Wainwright*, 601 F.2d 768, 770-71 (5th Cir. 1979).[12] It also held that *Nash* v. *Estelle*, 597 F.2d 513

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[11] "If. . . [the suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda* v. *Arizona*, 384 U.S. at 444-45.

'If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." 384 U.S. at 474.

[12] *See, also, Moore* v. *State*, 261 Ark. 274, 551 S.W.2d 185 (1977); *Webb* v. *State*, 258 Ark. 95, 522 S.W.2d 406 (1975); *People* v. *Brake, 191 colo. 390, 553 P.2d 763 (1976); People* v. *Cook*, 78 Ill. app. 3d 695, 397 N.E.2d 439 (1979); *Stevens* v. *State*, 265 Ind. 396, 354 N.E.2d 727 (1976) (statements inadmissible in case in chief); *State* v. *Boone*, 220 Kan. 758, 556 P.2d 864 (1976); *Murphy* v. *State*, 336 So. 2d 213 (Miss. 1976), *cert. denied*, 429 U.S. 1076 (1977) (statements are not voluntary when made after a request for attorney which is not honored); *People* v. *Bowers*, 45 A.D.2d 241, 357 N.Y.S.2d 563 (1974) (police may ask defendant to reconsider his request for an attorney but cannot go beyond that into interrogation).

(5th Cir. 1979) (en banc), had allowed further questioning only when the request for counsel is equivocal, and then only to the extent necessary to clear up any confusion as to the suspect's intentions. Once that confusion is dissipated, if it is clear that the defendant does want counsel's assistance, interrogation may not proceed in counsel's absence.

Illustrative of those cases in which a waiver may occur if the defendant seeks to talk to the police, and initiates the contact, is *United States* v. *Clark,* 499 F.2d 802 (4th Cir. 1972), where defendant had been arrested and presented for a preliminary hearing before a Federal magistrate on bank robbery charges. After the hearing, he was interviewed by FBI agents and asserted his right to counsel. He was thereupon transportated to the county jail. In circumstances similar to the case at bar, the same agents, knowing defendant had not yet procured counsel, reinterrogated defendant and received damaging admissions from him. The court held that defendant's Fifth and Sixth Amendment rights had been violated when, having previously asserted his right to counsel, "he was interviewed at the insistence of government agents without the presence of an attorney." 499 F.2d at 806. Lack of initiation of the interview by defendant was an important factor in holding defendant's alleged waiver to be involuntary.

Another case factually similar to that *sub judice* is *United States* v. *Womack,* 542 F.2d 1047 (9th Cir. 1976). There, the defendant was arrested in connection with a kidnapping and murder. When interrogated, he

twice requested appointment of counsel, but these requests were ignored. As in the instant case, the police returned uninvited to the jail the next day to reinterrogate the suspect. Womack later testified that he did not reassert his request for an attorney because his earlier requests had been to no avail and he did not believe any further resistance would benefit him. 542 F.2d at 1049. Petitioner Edwards, similarly, did not renew his request for counsel out of the same sense of frustration. *State* v. *Edwards,* 122 Ariz. at 217.[13] The *Womack* court held that, if the police failed to honor immediately a Fifth and Sixth Amendment request for counsel, interogation may not be continued. The state there failed to show a voluntary waiver, though the court did not preclude such possibility. The defendant's frustration at the police officers' blatant disregard of his request for counsel weighed heavily in favor of this finding. Similar circumstances militate for a similar finding in the instant case.

In *United States* v. *Blair,* 470 F.2d 331 (5th Cir. 1972), *cert. denied sub nom. Crews* v. *United States,* 411 U.S. 908 (1973), defendant was arrested in a United States Post Office and, upon being informed of his rights, requested the presence of his attorney. The interrogating postal inspector ignored this request, continued

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[13] Compare Womack's statements when asked why he did not renew his request for counsel ("because every time I asked for one, I never got one, so I gave up on the fact", 542 F.2d at 1051), with Edwards' response to the same question ("I didn't think you had to keep asking for an attorney over and over and over", J.A. 84).

interrogation and obtained incriminating statements. The suppression of these statements was upheld on the grounds that *Miranda's* prohibition of post-assertion interrogation "could hardly have been more uncompromising." 470 F.2d at 338. *See People* v. *Medina*, 37 Ill. App. 3d 1029, 347 N.E.2d 424 (1976). There was no evidence of defendant-initiated waiver, so the statement could not be used.[14]

The cases just discussed establish that postassertion interrogation is barred completely in some jurisdictions and barred in others unless initiated by the suspect. The result in the instant case would be the same regardless of the theory chosen. Edwards clearly did not initiate the "fatal" interview — he was told by the jailor that he had no choice in the matter. His statements would not be admissible unless police are allowed to initiate, on their own, reinterrogation following an accused's assertion of the right to counsel.

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[14] Other cases adopting a flat prohibition against resumed questioning, unless the defendant requests it, are *United States* v. *Massey*, 550 F.2d 300 (5th Cir. 1977) (defendant did not invite post-assertion interrogation, thus, no valid waiver); *People* v. *Harris*, 191 Colo. 234, 552 P.2d 10 (1976); *People* v. *Salazar*, 189 Colo. 429, 541 P.2d 676 (1975) (defendant must affirmatively withdraw a request for counsel); *State* v. *Crisler*, 285 N.W.2d 679 (Minn. 1979); *Commonwealth* v. *Mercier*, 451 Pa. 221, 302 A.2d 337 (1973); *State* v. *Turner*, 32 Ore. App. 61, 573 P.2d 326 (1978) (defendant may initiate conversations and police may make simple requests for reconsideration but police may not induce a post-assertion waiver), and *State* v. *Marcum*, 24 Wash. App. 441, 601 P.2d 975 (1979) (all questioning must stop but defendant may initiate waiver).

The adoption of a prohibition against reinterrogation is clearly mandated by *Miranda, Fare* v. *Michael C.* and *Mosely*. It is also fully consistent with the proposition that an accused in jail, who asks for the help of a lawyer, feels overmatched and is more susceptible to being coerced. In addition, it does not deprive the police of the opportunity to conduct an interrogation, but rather would only require that an accused receive what he is constitutionally entitled to — the right to consult counsel at a meaningful time, and to make a timely unfettered choice whether or not to speak.

C. Some Jurisdictions Do Allow Renewed Interrogations by the Authorities After a Request for Counsel, but Close Analysis Reveals That This Is Not the Better Rule.

The case adopting this position, relied upon by the Arizona Supreme Court in its opinion below, is *United States* v. *Rodriquez-Gastelum*, 569 F.2d 482 (9th Cir.) (en banc), *cert. denied,* 436 U.S. 919 (1978). Defendant was stopped as he was driving a car, later found to contain marijuana. After his arrest, he was asked if he wanted to talk about the marijuana and replied he would if he had an attorney. The Drug Enforcement Administration officer immediately asked, "Do you want to talk to me now without an attorney?", to which defendant replied, "That's fine." 569 F.2d at 483. The court ruled that there should be no per se bar to post-assertion interrogation when the defendant validly waives his previously asserted right to counsel. The basis

for this decision was that a per se rule would unnecessarily handcuff the police in the exercise of their duties and deny a suspect the opportunity to change his mind and talk to the police if he chose, in the free exercise of his will, to do so. Other courts have also taken such a position.[15]

Yet, several important considerations demonstrate that the reasoning of these cases cannot withstand close analysis.

Initially, it should be noted that the "unnecessarily handcuff the police" argument is unpersuasive and irrelevant. It fell on deaf ears, and rightfully so, when brought before this Court in *Miranda*, 384 U.S. at 441. Furthermore, to say that a rule designed to effectuate protections of the Fifth and Sixth Amendments should not stand because it hampers the police is to misconstrue those amendments totally. They are designed to protect the individual in his exercise of free will, not the police. Moreover, as already noted, what is involved is a delay amounting, normally, only to a matter of hours until a lawyer's advice is provided to the prisoner. Especially in

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[15] The following list, while not exhaustive, is indicative of cases following this position. *Blasingame* v. *Estelle*, 604 F.2d 893 (5th Cir. 1979); *White* v. *Finkbeiner*, 611 F.2d 186 (7th Cir. 1979); *United States* v. *Brown*, 569 F.2d 236 (5th Cir. 1978) (en banc); *United States* v. *Grant*, 549 F.2d 942 (4th Cir.), *cert. denied*, 432 U.S. 908 (1977); U.S. v. *Pheaster*, 544 F.2d 353 (9th Cir. 1976), *cert. denied sub nom. Inciso* v. *United States*, 429 U.S. 1099 (1977); *Biddy* v. *Diamond*, 516 F.2d 118 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States* v. *Hodge*, 487 F.2d 945 (5th Cir. 1973); *United States* v. *Springer*, 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972)

a case like this one, where trial preparation and not crime solving was the goal, the police would only be "handcuffed" from taking unfair advantage.

The Arizona Supreme Court contended, 122 Ariz. at 211, as do others, that a per se rule would not allow a person his right to self-determination but would imprison him in his privileges.[16] It is anomalous, however, to talk of freeing an individual to make up his own mind when the result of such a rule is the overbearing of a suspect's will by allowing continued custodial interrogation which, especially in the face of repeated attempts to halt the interrogation, is presumptively coercive. Further, the per se rule against police-induced reinterrogations would, in fact, allow self-determination. Arguments to the contrary overlook the fact that, in true cases of a suspect asking for counsel, the suspect has already acted in the exercise of his freedom of choice and has chosen to secure the assistance of legal counsel.

Perhaps more significant in this case than the fallacious reasons behind the *Rodriquez-Gastelum* rule is the fact that Robert Edwards' request for counsel and refusal to talk without a lawyer was never expressly withdrawn. Hence, *Rodriquez-Gastelum* and similar cases are quite unlike Edwards' situation. Cases such as *Rodriquez-Gastelum*, *supra*, and others following its position often involve an uncertain request, or a tentative one which is not confirmed. The issue here is

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[16] *United States* v. *Rodriguez-Gastelum*, 569 F.2d at 487 (*citing Adams* v. *United States ex rel, McConn*, 317 U.S. 269 (1942)).

what the authorities may properly do when the accused has, in fact, asked for counsel. That is what Edwards did, and the police understood it as such (J.A. 92). In *Rodriquez*, the accused said in almost the same breath that he would talk if he had an attorney, and that he would do so without. If the request for counsel is honored, the accused will have the advice of a lawyer, usually within hours, and, at most, in several days. The police can then either reinterrogate or not, as the advised defendant may choose. That is his right. If a defendant, who can retain his own counsel, deliberately delays in doing so, that may be reason enough to allow reinterrogation. But that issue is not presently before the Court. All that this case requires is a common sense determination that, once a suspect in custody asks for a lawyer, only he can reestablish communication before he speaks with his lawyer. The opinion of the Arizona Supreme Court, and other similar cases, obviously allow the least possible freedom for such self-determination, by placing the decision to reinstitute interrogation not in the hands of the individual, but in the hands of the police.

There are additional reasons which compel the conclusion that authorities should be precluded from reapproaching a suspect who has already asked for counsel. If the request for counsel is not honored and reinterrogation is undertaken, the inherent compulsion to speak, which *Miranda* strove to dissipate, is not mitigated; rather, it is intensified by evidencing a callous

disregard for a suspect's rights.[17] The case at bar shows how a suspect may feel compelled to give up the fight in the face of blatant refusal to honor an assertion of the right to counsel. *United States* v. *Womack*, 542 F.2d 1047 (9th Cir. 1976), illustrates the same point. The accused "gave up" because "Every time I asked for one, I never got one." 542 F.2d at 1051. *See, also, United States* v. *Hernandez*, 574 F.2d 1362 (5th Cir. 1978), where the court held that repeated readings of *Miranda* rights to a suspected drug trafficker, when the suspect continuously asserted his right to silence, was just the sort of subtle compulsion *Miranda* sought to eliminate. Furthermore, a rule allowing police to reinterrogate at will, thus forcing a suspect intent on utilizing his rights to reassert them at every juncture, will benefit only the hardened criminal who not only knows that escape from punishment may be achieved by baiting the police into overreaching, but who is also relatively unaffected by custodial atmospheres. *People* v. *Randall*, 83 Cal. Rptr. 658, 464 P.2d 114 (1970).

II. The Confession Should Have Been Suppressed Because It Was Taken In Violation Of Edwards' Sixth Amendment Right To Counsel Which Had Arisen Because Formal Prosecution Had Begun Before The Jail Interrogation.

The events of 20 January 1977, when the police hurried to reinterrogate Edwards at the county jail

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[17] *See, for example, People* v. *Washington*, 41 Ill. App. 3d 475, 354 N.E. 2d 501 (1976); *State* v. *Stevenson*, 523 S.W.2d 349 (Mo. 1975).

before he obtained appointed counsel at his first appearance that afternoon, violated not only *Miranda* v. *Arizona*, 384 U.S. 436 (1966). They infringed, as well, upon his right to the assistance of counsel at critical stages in advance of trial.

This case presents the Sixth Amendment problems such as were faced by the Court in *Massiah* v. *United States*, 377 U.S. 201 (1964); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Brewer* v. *Williams*, 430 U.S. 387 (1977); and *United States* v. *Henry*, _____ U.S. _____ (No. 79-121, June 16, 1980). All of these cases recognize that the right of an accused to have the assistance of counsel for his defense extends to various critical pretrial stages occurring after the commencement of prosecution against the accused, "whether by way of formal charge, preliminary hearing, indictment, information or arraignment", *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1973). Here, prosecution had begun against Edwards. The right to counsel that he enjoyed on the morning of his interrogation in the Pima County Jail was a concomitant of the process of judicial prosecution, and not solely a "prophylactic means of safeguarding Fifth Amendment rights", *Doyle* v. *Ohio*, 426 U.S. 610, 617 (1976).

Edwards was arrested in January 1976, some fifteen months after the robbery for which he was charged, pursuant to an arrest warrant issued on the authority of a criminal complaint (J.A. 70, 101). In Arizona, the filing of a complaint before a magistrate is one of two methods by which felony actions may be commenced.

Ariz. R. Crim. P. 2.2 (17 Ariz. Rev. Stat. Annot.). A complaint is a written statement of the essential facts constituting a public offense, made upon oath before a magistrate. Rule 2.3. Once a magistrate receives a complaint, he is required to examine such witnesses as he deems necessary and determine whether there is reasonable cause to believe an offence has been committed and the defendant committed it. Rule 2.4. He may either dismiss the complaint or proceed to issue a summons or a warrant of arrest. Ariz. R. Crim. P. 3.1 (Ariz. Rev. Stat. Annot.) These steps had been taken before Edwards had been arrested and incarcerated in the Pima County Jail overnight. The initial appearance at which the detectives knew Edwards would obtain appointed counsel was the procedure specified in Ariz. R. Crim. P. 4.1 and 4.2 (17 Ariz. Rev. Stat. Annot.). Such an appearance may include an arraignment, the appointment of counsel for indigents, and the scheduling of a preliminary hearing for those cases, such as this one, where a felony had already been charged by complaint.[18]

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[18] Rule 4.2 provides:

"*Rule 4.2. Initial Appearance*

a. *In General.* At the defendant's initial appearance, the magistrate shall:

(1) ascertain the defendant's true name and address and, if necessary, amend the formal charges to reflect it, instructing the defendant to notify the court promptly of any change of address;

(2) inform him of the charges against him;

(3) inform of his rights to counsel and to remain silent;

(4) appoint counsel if the defendant is eligible for and requests appointed counsel under Rule 6; and

(5) determine the conditions of release in accordance with Rule 7.2.

The State, then, had commenced its prosecution of Petitioner Edwards when the Complaint was filed. *Moore* v. *Illinois*, 434 U.S. 220, 228 (1977).[19]

The interrogation conducted by Officers Marmion and Milne was for trial preparation purposes. Marmion went down to the jail to "see what he was going to tell me on that particular day" (J.A. 51), and Milne went along at the direction of Sergeant Bunting, to be "a witness to any statements that he made" (J.A. 68). It was purely an attempt to obtain a confession from Edwards. Accordingly, there is no doubt that the agents set out to "deliberately elicit" incriminating statements from Edwards within the meaning of *Massiah* v. *United States*, 377 U.S. 201 (1964), and *United States* v. *Henry*, _____ U.S. _____ (No. 79-121, June 16, 1980). Of course, there is no doubt that this kind of confronta-

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b. *Misdemeanors: Felonies Charged By Indictment.* When a defendant charged with a misdemeanor or indicted for a felony is brought before a magistrate for his initial appearance, he shall, in addition to the procedures set forth in Section a, be arraigned in the manner prescribed by Rule 14, if counsel is present or waived. If the appearance is before a magistrate without jurisdiction to try the offense, the magistrate shall transfer the case to the proper court for arraignment.

c. *Felonies Charged By Complaint.* When a defendant is charged in a complaint, the magistrate shall, in addition to the procedures required by Section (a):

(1) inform the defendant of the right to a preliminary hearing and the circumstances under which and procedures by which that right may be waived; and

(2) unless waived, set the time for a preliminary hearing in accordance with Rule 5.1."

[19] *United States ex rel. Robinson* v. *Zelker*, 468 F.2d 159 (2d Cir. 1972), *cert. denied sub nom. Zelker* v. *Robinson*, 411 U.S. 939 (1973). *Cf. Commonwealth* v. *Whiting*, 439 Pa. 205, 266 A.2d 738 (1970)

tion, after commencement of prosecution, designed to obtain an admissible confession at the trial of the accused, is that kind of critical stage at which Edwards was entitled to the presence and assistance of counsel. *Massiah, supra; Brewer* v. *Williams*, 430 U.S. 387 (1977); *United States* v. *Henry, supra.*

In this case, the interrogation of Edwards by Detectives Marmion and Milne was especially critical. It was, of course, an attempt to obtain a confession for use at trial, and to substitute interrogation, in an isolated jail house interview booth, for the trial. Counsel's presence was necessary to "minimize the imbalance in the adversary system", *United States* v. *Ash*, 413 U.S. 300, 309 (1973), "where the accused is confronted by his expert adversary" under circumstances where "the results might well settle the accused's fate", *Id*, at 310.

The fruits of Marmion's interrogation were not tape recorded, written down or formally acknowledged by Edwards in any way.[20] Edwards did not testify in his own defense at his trial. Thus, counsel's absence left Edwards "unable to present his version [of what occurred

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[20] Edwards at first testified, during the Motion to Suppress, that he had not made a statement (J.A. 49-50). Upon the resumption of the Supopression Hearing a few days later, he acknowledged that he had made a statement and that his prior testimony to the contrary was because "the D.A. was talking too fast. I was confused." (J.A. 80.) Indeed, the transcript of Edwards' previous day's testimony demonstrates some confusion (J.A. 49-50).

Curiously, Officer Marmion did not preserve the tape recording he made upon leaving the jail after interviewing Edwards on the morning before his initial appearance (J.A. 58-59), but simply prepared a routine "supplemental report" sometime later (J.A. 53).

at the jail] effectively without giving up his privilege against compulsory self-incrimination". *United States* v. *Ash, supra*, 413 U.S. at 313. In many cases, trials are won or lost on the basis of confessions. *Culombe* v. *Connecticut, supra; Miranda* v. *Arizona, supra.* If a suspect is denied his right to counsel at this stage of the proceedings when this most probative piece of evidence is being sought, his right to effective assistance of counsel at later stages is an empty promise. *Culombe* v. *Connecticut, supra; Crooker* v. *California*, 357 U.S. 433 (1958) (Douglas, J., dissenting).

The fact that inculpatory statements obtained from Edwards were received in evidence is not the only adverse effect of his loss of the right to counsel. On the night before, Edwards had asked Bunting about the prospects of "making a deal" and, according to Bunting, had spoken to the prosecuting attorney about the possibility of making a deal.[21] Edwards had then told Sergeant Bunting that he would obtain a lawyer before making a statement and before making a deal (J.A. 151), expressing himself in such a way that the trial court concluded Edwards intended for the deal to be based, at least in part, on his giving a statement in exchange for lenient treatment or some other accommodations from the State (J.A. 1). The next day, when Mar-

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[21] At the Suppression Hearing, Edwards agreed that he had wanted to make a deal and decided to wait to either make a statement or deal until after he obtained counsel, but testified that he did not ask to speak to the County Attorney, asking instead for a lawyer. He said he was surprised to find that the lawyer Bunting obtained for him by telephone was the District Attorney (J.A. 73).

mion and Milne went to the county jail, there was, according to their testimony, no further reference to the making of a deal. We can presume that Edwards did not realize the adverse effect of the admissions he was to make that morning upon any plea bargaining he might later undertake.

This Court has recognized that plea bargaining is "an essential component of the administration of justice" which "presupposes fairness in securing agreements between an accused and a prosecutor", *Santobello* v. *New York*, 404 U.S. 257 (1971). Plea bargaining is an inherent part of the modern system, *Blackledge* v. *Allison*, 431 U.S. 63 (1977); *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978), and the Sixth and Fourteenth Amendment guarantees of counsel and due process apply fully as much to the plea bargaining process as to other essential or critical phases of the prosecution. It has also been recognized that, when entering into a plea bargain, the defendant is waiving substantial constitutional rights[22] and that the presence of counsel (or a valid waiver thereof) is necessary to insure due process of law. *Bodenkircher* v. *Hayes*, 434 U.S. 357, *reh. denied*, 435 U.S. 918 (1978); *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *Brady* v. *United States*, 397 U.S. 742 (1970).

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[22] By pleading guilty, a defendant waives his right to put the state to its proof, his right to a trial by jury, his right to confront witnesses against him and his right not to incriminate himself. *U.S. Const., Amend. V; U.S. Const., Amend. VI; United States* v. *Brady*, 397 U.S. 742 (1970); *cf. Vont Moltke* v. *Gillies*, 332 U.S. 708 (1948) (emphasizing the importance of counsel when pleading guilty).

Thus, when Edwards was reinterrogated by Marmion and Milne, knowing that he had not yet been able to obtain counsel and did not have a lawyer, he was not just making incriminating statements to an expert adversary, but was also impairing his prospects for plea bargaining which, though not part of the State's written criminal procedures, offered informal opportunities that could have been extremely significant and beneficial to Edwards. That a bargain might have been reached for Edwards' testimony, to convict a co-defendant or assure his own conviction, in exchange for the reduction of charges or the minimization of a potential sentence, is hardly a novel concept to the criminal lawyer. This case involved a potential death penalty, an obvious potential goal for defense plea bargaining. It also involved a first-degree felony murder charge that depended for a conviction upon convincing a jury to accept felony murder instructions and to conclude that the robbery was a legal cause of the bar proprietor's death by heart attack. One co-perpetrator had already been given immunity. We can conclude that, on the night of his arrest, Edwards had appropriate concerns in wanting to bargain his testimony for some concessions, but decided that he was inadequate to the task of negotiation. It would have been difficult, if not impossible, for him to negotiate for himself without, at the same time, giving up his right to remain silent.

While the State was, of course, not obliged either to bargain with Edwards or to refrain from attempting to get a statement from him, *United States* v. *Washington*,

431 U.S. 181, 187 (1977), it was proscribed from frustrating and circumventing Edward's request for and right to counsel until such time as counsel's assistance would be virtually ineffective. Yet, that is what happened here. The right to counsel embraces counsel's assistance at such time and in such manner as to assure that his participation in trials or critical pretrial events is informed and effective. *Powell* v. *Alabama*, 287 U.S. 45 (1932). In its Rules of Criminal Procedure, Arizona recognizes that effective representation must occur "as soon as feasible after a defendant is taken into custody."[23] This Court can guarantee no less.

The interrogating officers, and Sergeant Bunting who sent Milne to be a witness to any possible statements, certainly knew that their morning's interrogation, if successful, would have the effect of frustrating Edward's right to appointed counsel.[24] Even had they not, the Sixth Amendment violation is no less prejudicial. Nor does it matter that Edward's right to counsel was

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[23] Ariz. R. Crim. p. 6.1(a) (17 Ariz. Rev. Stat. Annot. Supp.), specifies:

> "a. *Right to be Represented by Counsel.* A defendant shall be entitled to be represented by counsel in any criminal proceeding, . . . The right to be represented shall include the right to consult in private with an attorney, or his agent, *as soon as feasible after a defendant is taken into custody,* at reasonable times thereafter *and sufficiently in advance of proceeding to allow adequate preparation therefor.*" (Emphasis supplied.)

[24] Bunting dispatched Milne to interrogate Edwards, but even if he had not, Marmion and Milne were charged with Bunting's knowledge that Edwards wanted a lawyer. *People* v. *Ireland*, 75 Cal. Rptr. 188, 450 P.2d 580 (1969). *Cf. Whitely* v. *Warden*, 401 U.S. 560, 568 (1971); *Smith* v. *United States*, 358 F.2d 833, 835 (D.C. Cir. 1966).

violated at its inception, before he was given appointed counsel. *McLeod* v. *Ohio*, 381 U.S. 356 (1965). There, this Court, by summary reversal, applied *Massiah, supra,* to a case like this one, where the right to counsel attached but counsel had not yet been provided.

III. The Fourteenth Amendment Guarantees Of Due Process, Requiring That All Stages Of The Prosectuion Be Conducted Within Traditional And Accepted Notions Of Fundamental Fairness, Prohibit The Use Of A Confession Obtain After Prosecution Has Begun, Before The Accused Can Obtain Counsel's Advice Or Presence

Edwards' prosecution in court commenced upon the filing of the Complaint, and his interrogation on January 20 was to get him convicted. Realizing this, the focus of the prosecution efforts had shifted from investigative to prosecutorial. Consequently, not only had the Sixth Amendment right to counsel attached, but other constitutional guaranties that would affect the fairness of the judicial proceedings were afforded Edwards. The due process clause is among them.

It may be that, before the State has determined to prosecute an accused and has begun court proceedings to do so, the police can and should conduct interrogations using the range of deception and trickery that has been so widely reported, so long as the sum total is not a coerced confession or a violation of the warnings required and procedures specified in *Miranda* v. *Arizona.*

After prosecution commences, however, interrogation is a critical stage, and the jail house interrogation is a critical stage, and the jail house interrogation readily becomes an attempt not to investigate a crime, but to substitute inquisition in private for a public adversarial trial. Hence, while this Court may not be overly concerned with the propriety of such pre-critical stage police practices as obtaining a suspect's confession by falsely stating to defendant that his fingerprints were found at the scene of the crime,[25] a police officer/friend of the suspect falsely telling him that his job was in jeopardy,[26] or false lineups and other psychological tactics and techniques,[27] considerations of fundamental fairness must play a greater role when a critical stage is involved.[28] The possibilities for psychological gamesmanship and deception are almost limitless,[29] and permitting such tactics where the process is avowedly intended to replace obtaining testimony of the accused on the witness stand during a public trial, would have this Court placing its imprimatur on the sporting theory of justice that has long been discredited. *Cf., Wardius* v.

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[25] *Oregon* v. *Mathiason*, 429 U.S. 492 (1977).

[26] *Spano* v. *New York*, 360 U.S. 315 (1959).

[27] *See, generally,* White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581.

[28] Even at that, this Court has noted the difficulty in distinguishing between proper police conduct and methods offensive to due process. *See Haynes* v. *Washington*, 373 U.S. 503, 515 (1963).

[29] *See Kamisar Brewer* v. *Williams, Massiah, and Miranda: What is "Interrogation"? When does it matter?* 67 Georgetown L.J. 1, 16, 17, 23 (1978).

Oregon, 412 U.S. 470 (1973). And yet we do not ask that this Court conclude that policemen may not conduct interrogations in that manner after a criminal prosecution is commenced. Instead, we simply seek a holding that such an attempt may not occur unless and until an accused has obtained and consulted with counsel and counsel has an opportunity to even the odds by being present and assisting his client.

The initiation of such secret interrogations after prosecution is commenced is, as we will shortly show, a practice that has been severely criticized by members of this Court and other courts as "unethical", "unfair", "forbidden" and "undesirable". There is no reason that fundamental fairness as guaranteed by the Fourteenth Amendment should not govern this critical stage and this kind of evasion of the right to counsel.

This Court is accustomed to prohibiting the State from taking unfair advantage, both during trial and before it. A prosecutor is prohibited by the due process guaranties of the Fourteenth Amendment from taking advantage of false testimony and failing to correct it. *E.g., Napue* v. *Illinois*, 360 U.S. 264 (1959). Similarly, a state may not suppress evidence favorable to the accused, after a request, without violating the due process rights of the accused. *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Doyle* v. *Ohio*, 426 U.S. 610, 617 (1976), holds that an accused's silence after receiving *Miranda* warnings cannot be used to impeach exculpatory trial testimony; to allow otherwise permits penalizing a defendant for exercising a right given him. In *Reece* v.

Georgia, 350 U.S. 85 (1955), this Court held that due process was violated by a rule requiring an accused to challenge the composition of a grand jury panel at a time when counsel had not been appointed and could not act. Such a rule, it was said, erected a barrier to the assertion of the constitutional right to effective counsel and, therefore, contravened due process. The general principle advanced here was aptly stated by Mr. Justice Powell in *Argersinger* v. *Hamlin*, 407 U.S. 25, 44 (1972) (concurring opinion):

> "Due Process, perhaps the most fundamental concept in our law, embodies principles of fairness rather than immutable line drawing as to every aspect of a criminal trial."

Here, if to undertake a secret interrogation without counsel violates widely accepted notions of ethics and fairness, it should be prohibited under the due process clause. And there is no doubt that such actions have meet with widespread disapproval.

For example, in *United States* v. *Springer*, 460 F.2d 1344, 1354 (7th Cir. 1972), then-Circuit Judge Stevens dissented from a panel majority which found that an interrogation of an accused, after indictment, without giving his counsel the right to be present, did not vitiate the conviction in the case at bench. Under circumstances identical to those in this case, where a jail interrogation was carried out solely for trial preparation, after the beginning of prosecution in the absence of either notice to or presence of defense counsel, and having no investigative purpose, the dissent noted, "In a civil con-

text I would consider this behavior unethical and unfair. In a criminal context I regard it as such a departure from 'procedural regularity' as to violate the due process clause of the Fifth Amendment." 460 F.2d at 1355.

In *Mathies* v. *United States*, 374 F.2d 312 (D.C. Cir. 1967), Chief Justice, then-Circuit Judge Burger, writing for the panel of Circuit Judges, discussed a "troublesome problem" arising out of the police officers having questioned an accused after indictment without notifying his counsel. The court concluded that evidence challenged later at trial was not the fruit of the questioning. But, the opinion noted that, in a civil context, such conduct would have been forbidden and, in a criminal context, it was said that *Miranda* v. *Arizona*, 384 U.S. 436 (1966), "plainly will require that such interviews can be conducted only after counsel has been given an opportunity to be present." 374 F.2d at 316, n. 3. The court said, "We assume that the episode will not arise again in the future." *Id.*, at 316. But, it is now a familiar pattern.[30]

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[30] Hurried interrogations, before a lawyer can come into the picture, are not unusual events. Indeed, court cases reflect a pattern of police conduct in which one sees repeated attempts to interrogate prisoners outside the presence of counsel. *United States* v. *Cobbs*, 481 F.2d 196 (3d Cir. 1973), *cert. denied*, 414 U.S. 980 (1973); *United States* v. *Durham*, 475 F.2d 208 (7th Cir. 1973); *United States* v. *Miller*, 432 F. Supp. 382 (E.D. N.Y. 1977), *aff'd sub nom. United States* v. *Fernandez*, 573 F.2d 1297 (2d Cir. 1978); *United States* v. *Cookston*, 379 F. Supp. 487 (W.D. Tex. 1974); *State* v. *Turner*, 32 Ore. App. 61, 573 P.2d 326 (1978) (interrogation before defendant could speak with newly appointed counsel; *Miranda* rights given and statements made, but no waiver); *State* v. *Travis*, 360 A.2d 548 (R.I. 1976).

The Ninth Circuit has found the conduct of a confrontation between agents for the prosecution and the defendant, under circumstances designed to prevent the attendance or advice of counsel, to be a violation of the Sixth Amendment. *See Schantz* v. *Eyman*, 418 F.2d 11, 13 (9th Cir. 1969). There, a confrontation occurred between the accused and a mental health expert, and was intended to elicit evidence countering an insanity defense. The Ninth Circuit has not found a Sixth or Fourteenth Amendment violation in similar encounters between interrogators and the accused, but has severely criticized such tactics. The leading Ninth Circuit case is *Coughlan* v. *United States*, 391 F.2d 371 (9th Cir. 1968), in which the *per curiam* opinion criticized the practice of interrogating an accused after the institution of prosecution, without notice to counsel. Judge Hamley wrote an extensive, widely-quoted dissent, in which he concluded that, for interrogating officers to renew a request for a statement, during a private and in-custody confrontation in the absence of counsel, when the accused had previously indicated he did not wish to talk with the interrogating officers, "flouts the spirit of the Fifth and Sixth Amendments and the rational of *Miranda.*" 391 F.2d at 374. Judge Hamley quoted the above cited portion of *Mathies* v. *United States, supra,* and also concluded that former Canon 9 had been violated by such a procedure. 391 F.2d at 375-76. In addition, the Ninth Circuit has said, in *United States* v. *Four Star,* 428 F.2d 1406 (9th Cir. 1970), that to conduct an in-custody interrogation of an accused person known to be represented by counsel without affording counsel an op-

portunity to be present is "undesirable . . . and that a prosecuting attorney who . . . takes advantage of its results violates professional ethics." 428 F.2d at 1406, 1407 (1970).

The Seventh Circuit in *United States* v. *Durham,* 475 F.2d 208 (7th Cir. 1973), excluded a confession because of the "ethical questions" and a conclusion that the government carried a burden to show that Durham's counsel was notified of the interrogation.

Reference has been made in this Court's opinions to the proposition that interrogations of an accused without giving counsel an opportunity to be present is a violation of former Canon 9 and of present DR 7-104, without deciding whether or not such conduct contravenes either Sixth or Fourteenth Amendment guarantees. *E.g., Masiah* v. *United States,* 377 U.S. 201; *United States* v. *Henry,* _____U.S. _____, n. 14 (No. 79)121, June 16, 1980). Other courts have disapproved such tactics without reaching the constitutional issue. *E.g., United States* v. *Thomas,* 474 F.2d 110 (10th Cir. 1973) ("This does not necessarily present a constitutional question, but this is an ethical and administrative one . . .", *id.*, at 112); *People* v. *Green,* 405 Mich. 273, 274 N.W.2d 448 (1979) (because defendant had instituted interview, violation of DR 7-104 "relatively innocuous" and, therefore, no due process violation, *id.*, at 455); *People* v. *Hobson,* 39 N.Y.2d 479, 348 N.E.2d 894 (1976) (prohibiting such interrogations as a matter of state constitutional law); *State* v. *Yatman,* 320 So. 2d 401 (Fla. App. 1975) ("While we condemn the pro-

cedure employed here, we conclude that it does not automatically require a dismissal", *id.*, at 403). Some courts have rejected an exclusionary effect because of a violation of the Canon of Ethics, *e.g.*, *United States* v. *Masullo*, 489 F.2d 217 (2d Cir. 1973) (defendant requested interview, court concerned that rule would be applied only to those who actually have lawyers); *State* v. *Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976) (DR 7-104 applies only to civil cases, *id.*, at 191); *State* v. *Nicholson*, 77 Wash. 2d 415, 463 P.2d 633 (1969) ("The purpose of Canon 9 was to assure to civil litigants some of the protection from these influences which the Federal and State Constitutions guarantee to criminal defendants", *id.*, at 636).

It is obvious that the vast weight of opinion concludes that, for a prosecuting attorney or his agents to interrogate an accused for purposes of obtaining a confession usable in court, without advising his counsel, is unethical and improper behavior. It is just as wrong to do so before one can obtain the counsel he has asked for and will receive within hours. *McLeod* v. *Ohio*, 381 U.S. 356 (1965).[31] We do not here contend that the

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[31] In *McLeod*, the Ohio Supreme Court had concluded that *Massiah* v. *United States*, 377 U.S. 201 (1969), was inapplicabe because *McLeod* had not yet received appointed counsel. This court summarily reversed. *See also Abeles* v. *State Bar*, 108 Cal. Rptr. 359, 510 P.2d 719 (1973), indicating that DR 7-104 applies even where a party has counsel of record but not one actually authorized to act for the party. 510 P.2d at 723. And at least one state ethics opinion has expressly indicated that the prohibition to interrogate an accused in the absence of notice of counsel applies "as of the time that defendant had requested counsel, rather than as of the time that it might be said that counsel was technically appointed or

Sixth or Fourteenth Amendment ought to incorporate DR 7-104 of the Code of Professional Responsibility, either "bag and baggage" or at all. Instead, we merely cite the widespread acceptance and application of that rule, as indicative of the ethical impropriety of the one-sided secret contact that occurred in this case, which is certainly pertinent to determining whether the Arizona authorities intentionally or negligently deprived Edwards of his Sixth Amendment rights, *Michigan* v. *Tucker*, 417 U.S. 433 (1974), or whether they "consciously and knowingly set out to violate such rights", *Brewer* v. *Williams, supra*, 430 U.S. at 407 (Marshall, J., concurring). Moreover, if "due process" is a combination of notions of fundmental fairness, *Argersinger* v. *Hamlin, supra* (concurring opinion), and the principle that conviction may only result from a fair trial that is "not a sham or a pretense," *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937), then this Court can surely allow the ethical impropriety of what happened to Robert Edwards to enter into its definition of "due process".

It hardly seems novel or controversial to conclude that intentionally avoiding the presence of consel when

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retained." Opinion No. 155, 28 Oregon State Bar Bulletin, p. 10, Oct. 1967. And the Texas Bar concludes that the county attorney should give the accused an opportunity to secure counsel, and only conduct a confrontation if such an opportunity is afforded and rejected. Texas Bar Opinion 226, 18 Baylor L. Rev. 195, 307 (1966). It has also been made clear that the ethical strictures apply where a police officer is permitted by a state's attorney to conduct an interrogation or the state's asttorney uses the fruits of such an interrogation. *See Illinois Professional Ethics Opinion 320, 58 Ill. B.J. 139 (1969); Texas Bar Opinion 144, 18 Baylor L. Rev. 195, 255 (1966).*

conducting a confrontation between an accused and his interrogators solely to obtain trial testimony, justifies reversal of a conviction. As one respected commentator noted fifteen years ago, the overall concept of due process is available where the police "elicit a confession at the stationhouse from a suspect whose case is ripe for presentation to a magistrate, thus postponing the assistance of counsel". Judge Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Cal. L. Rev. 929, 951 (1965). And in a case later affirmed by this Court on retroactivity grounds, Judge Friendly said in dissent:

> "I continue to believe that, in the absence of overriding necessity or consent, a man who has been brought before a judge on a charge of a capital crime, and has expressed his desire for counsel, is entitled under the constitution *to be let alone until he gets one." United States ex rel. Stovall* v. *Denno,* 355 F.2d 731, 745 (2d Cir. 1966), *aff'd sub nom Stovall* v. *Denno,* 388 U.S. 293 (1967) (emphasis supplied).

The courts of the various circuits that have passed on the matter conclude *at least* that Judge Friendly was right: One prosecution has started and an accused wants a lawyer, he should be let alone until he gets one.[32] They and some states' Supreme Courts have refrained from holding as a matter of due process that this unfairness should be redressed. Inasmuch as these occurrences significantly affect the fairness of the ensuing trial, by permitting the development and presentation of evidence

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[32] *See* cases discussed *supra,* at pp. 47-50.

that is necessarily onesided and may be coerced, this Court should recognize that due process is violated by such a state of affairs, and should prohibit the introduction of a confession obtained as a result of an interrogation which has bypassed defense counsel.

IV. Even If There Could Be A Waiver After Edwards Asked To Have A Lawyer And Told The Jailor He Did Not Want To Speak With The Detectives, The Record Does Not Permit A Finding That A Waiver Occurred.

If, notwithstanding what has been said in Argument I above, *Miranda* v. *Arizona*, 384 U.S. 436 (1966), is interpreted to permit the police to reinterrogate Edwards after he has asked for a lawyer and said he did not want to talk with the detectives, the question of waiver must then be considered. Furthermore, even if a *Miranda* waiver might have occurred, an even stronger showing is required to establish that Edwards waived the right to the assistance of counsel at a critical pretrial which Argument II, above, demonstrates he was entitled to. Under both circumstances, the only event upon which a finding of waiver could be based is that, on the morning after his arrest, Edwards ultimately gave a statement when he was reinterrogated. He did not revoke his request for counsel made the evening before. He had not had a chance to consult with counsel. He told the detention officer he did not want to speak to anyone. He said he did not want a statement taped because it could be used against him in court of law. Under whatever standard is applied, these facts do not make out a waiver.

It is axiomatic that, in order to waive a Federally guaranteed constitutional right, there must be shown an understanding and intelligent relinquishment of a known right. *Tague* v. *Louisiana*, _____U.S._____ (No. 79-5386, Jan. 21, 1980).[33] The burden of proof is on the government, and it is a heavy one.[34] *Tague* v. *Louisiana, supra; Miranda* v. *Arizona*, 384 U.S. 436 (1966), and the prosecution cannot be said to have carried its burden in the case at bar.

Courts must indulge in every reasonable presumption against a finding of waiver, *North Carolina* v. *Butler*, 441 U.S. 369 (1979), and any waiver allegedly obtained subsequent to a request for counsel is constitutionally suspect when it is the result of continued interrogation, because it is that interrogation which should cease upon the assertion of the right to a lawyer.[35]

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[33] *Tague* is the latest of many cases of this Court on the subject: *North Carolina* v. *Butler*, 441 U.S. 369 (1979); *FAre* v. *Michael C.*, 442 U.S. 707 (1979); *Brewer* v. *Williams*, 430 U.S. 387 (1977); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973; *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Brookhart* v. *Janis*, 384 U.S. 1 (1966); *Carnley* v. *Cochran*, 369 U.S. 506 (1962); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

[34] As the importance of the right is increased, the need for a clear showing of waiver is concomitantly higher. Rights which are fundamental to the assurance of a fair trial are more important (right to counsel, for example) than rights such as those promulgated by the Fourth Amendment which do not, in and of themselves, affect the fairness of any ensuing trial. *Schneckloth* v. *Bustamonte*, 412 U.S. at 240 (applying high standard to *Miranda* waivers).

[35] The initial assertion of the right to counsel "weighs heavily against the finding that a subsequent uncounseled confession is voluntary." *United States* v. *Clark*, 499 F.2d at 807. *See, also, Commonwealth* v. *Murray*, 359 Mass. 509, 269 N.E.2d 641 (1971);

> "[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Michigan* v. *Mosley,* 423 U.S. at 110, n. 2 (White, J., concurring).

See, also, People v. *Ireland,* 75 Cal. Rptr. 188, 450 P.2d 580 (1969). Edwards had asserted his right to counsel the day of his arrest. When the police sought to interview him the following morning, he endeavored to assert his right not to talk to them but was forced to do so by the jailer (J.A. 77). This continued interrogation in the face of repeated assertions by Edwards that he chose not to talk to the police weighs heavily against a finding of voluntary waiver, *United States* v. *Womack, supra; United States* v. *Hernandez, supra,*[36] as police may not be permitted to overbear a defendant's will. *North Carolina* v. *Butler, supra; Brewer* v. *Williams, supra.* According to Edwards' testimony, he finally talked to the police because he did not believe renewing his request for an attorney would be efficacious. 122 Ariz. at 217 (Gordon, J., dissenting). This demonstrates that he did not voluntarily change his mind about wanting a lawyer before he made a statement but, rather, that he

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State v. *Nash,* 407 A.2d 365 (N.H. 1979); *People* v. *Cunningham,* 49 N.Y.2d 203, 424 N.Y.S.2d 421 (1980) (uncounseled waiver following request for counsel cannot be voluntary).

[36] *See, e.g., Dyett* v. *People,* 177 Colo. 370, 494 P.2d 94 (1972); *Holmes* v. *Staste,* 300 A.2d 6 (Del. 1972); *People* v. *Grant,* 45 N.Y.2d 366, 380 N.E.2d 257 (1978); *People* v. *Byers,* 71 A.D.2d 77, 421 N.Y.S.2d 462 (1979).

simply concluded that he would not get one. And it is not at all clear that he understood that verbal statements could be used against him in court.

After being ordered to meet with the police officers the morning after his arrest, Edwards showed that he failed entirely to grasp the import of what the police were saying to him. First, he reasserted his right to silence when the jailor insisted he had to talk to the officers. Yet, being read his rights, he agreed to talk but did not want his statements recorded so that they could not be used against him. Even after the police officers explained that oral statements were admissible, regardless of whether recorded or not, Edwards exhibited obvious confusion by continuing to insist that the statements not be taped. If he had acutally understood his rights, he would not, given his continued attempts to avoid self-incrimination, have consented to make a statement. As he did not understand his rights he could not have validly waived them. *United States* v. *Clark, supra* (marked confusion as to the meaning of rights weighs heavily against a finding of valid waiver).

At the very least, Edwards' adoption of such manifestly self-contradictory positions should have alerted the police to his ultimate failure to grasp the meaning of the proffered warnings and counseled against further questioning. *See Thompson* v. *Wainwright, supra; United States* v. *Nielsen,* 392 F.2d 849 (7th Cir. 1968); Pirtle v. *State,* 263 Ind. 16, 323 N.E.2d 634 (1975). In *Nielsen,* defendant was interrogated after his arrest for the theft of a car. As in the instant case,

defendant asserted his constitutional rights to an attorney and to silence. He said he would not sign the waiver form until he had seen his attorney. The police testified at trial that defendant then said they could proceed with their questioning. The *Nielsen* fact pattern closely tracks the instant case, where Edwards refused to allow the taping of his statement but proceeded to answer questions. The *Nielsen* court recognized that the defendant's adoption of a self-contradictory position with respect to his right not to incriminate himself was evidence of a lack of comprehension such that the subsequent statements were not the product of a valid, understanding waiver of defendant's rights. The same result is warranted in the case at bar.

In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), this Court made it clear that, contrary to the situation involving a consent search, the government must prove that Edwards made "an intentional relinquishment or abandonment of a known right or privilege" before he can be found to have waived his right to counsel, and that this test of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), applied to waivers of counsel in an interrogation situation, 412 U.S. at 236-239. Under circumstances in which no right to counsel has been claimed, but instead involved an accused hearing the *Miranda* warnings and deciding to make a statement, this Court held in *North Carolina* v. *Butler, supra,* that a waiver of the rights to remain silent and to have counsel, under *Miranda* v. *Arizona, supra,* need not be made expressly but could be implied from the particular facts and circumstances

surrounding the case. *North Carolina* v. *Butler* did not retreat from the high standards set in *Schneckloth* and previous cases, as is demonstrated by *Fare* v. *Michael C.*, 442 U.S. 707 (1979), in which this Court reaffirmed its statement in *Miranda* v. *Arizona,* that if an interrogation continues without the presence of an attorney and a statement is taken "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel", 384 U.S. at 475. That proposition was again reinforced by the opinion of this Court last term in *Tague* v. *Louisiana,* _____U.S. _____ (No. 79-5386, Jan. 21, 1980). None of these cases hold that a waiver of *Miranda* protections can be found on facts like those presented here. To the contrary, what is demonstrated is an attempt to support a waiver merely by virtue of the fact that a statement was obtained on the morning of January 20, 1977, while Edwards was still waiting for counsel.

As the New Hampshire Supreme Court recognized, there is a difference in the showing needed to establish, by the totality of circumstances, a voluntary waiver of "first level" *Miranda* warnings, and what is required where counsel is requested. "A voluntary oral or written express waiver (not induced by further interrogation) [should] be obtained once the right to councel is asserted." *State* v. *Nash,* 407 A.2d 365, 368, (N.H. 1979).

In order for the State of Arizona to establish that the waiver requirements of *Johnson* v. *Zerbst, supra,*

had been satisfied, it carried the very heavy burden of proving that Edwards was quite conscious of his right to counsel, and voluntarily chose to forego counsel's help. The Arizona Supreme Court, while concluding that Edwards' statements were voluntarily made, did not determine whether an effective waiver of the Sixth Amendment right to the assistance of counsel was made and, conceding for the moment that the statement itself was voluntarily made, it was clearly unaccompanied by any voluntary relinquishment of counsel's help.[37]

This Court has never found a valid waiver of the right to counsel, during a critical stage interrogation, occurring after commencement of prosecution. Under most circumstances, the issue of waiver of counsel arises in court, and a decision is reached by a judge, before the proceeding occurs for which a waiver of counsel is contemplated. This Court has imposed upon judges considering such waivers the "solemn duty . . . to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at

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[37] The State court did inject a troublesome procedural quirk into the case when it determined, as a matter of Arizona criminal procedure, that a waiver of counsel existed. Edwards had argued that Ariz. R. Crim. P. 6.1(c), which required a waiver of right to counsel to be "in writing after the court has ascertained that he knowingly, intelligently and voluntarily desires to forego them . . .", applied to the right to counsel guaranteed "as soon as feasible after being taken into custody". Ariz. R. Crim. P. 6.1(a) (17 Ariz. Rev. Stat. Annot.). The Supreme Court agreed that the language of the Rule, on its face, required such a written waiver approved by the court, but held, on the basis of its prior cases, that no such formal waiver was required (J.A. 19-20; 122 Ariz. at 212).

every stage of the proceedings", *Von Moltke* v. *Gillies,* 332 U.S. 708, 722 (1948).

Of course, in some circumstances, the argument of waiver simply could not be made. *E.g., Massiah* v. *United States,* 377 U.S. 201 (1964); *United States* v. *Henry,* _____U.S. _____ (No. 79-121, June 16, 1980). In *Brewer* v. *Williams,* 430 U.S. 387 (1977), this Court held that no waiver of the right to counsel had been established. Williams had had several *Miranda* warnings given to him, and had conferred with counsel at least once by telephone and twice in person, before Captain Leaming gave the "Christian burial" speech, which elicited Williams' damaging admissions. The record in this case falls short of that in *Williams,* in establishing the level of comprehension by Edwards of his right to counsel, and the extent of the volition that he exercised in making the statements without waiting to consult with counsel. In addition, here, unlike *Williams,* Edwards had not yet been able to speak with counsel; he was reinterrogated by Marmion and Milne after an overnight stay in "the hole"; he was called out to the jail interview room over his objections; and although he mentioned, according to Marmion's testimony, that he did not yet have a lawyer, he apparently said nothing about giving up his prior request, or being willing to forego the advice of a lawyer. Finally, the statements that Edwards made about talking with Marmion ("I'll tell you what you want to know but I don't want it tape recorded because I don't want it used against me in a court of law," (J.A. 53)) hardly indicates a state of mind in

which Edwards had reconciled to his satisfication how the assistance of counsel would help him or hinder him in dealing with an interrogation by the detectives, and in preserving the opportunity to engage in plea bargaining.[38]

Like *Brewer* v. *Williams, supra,* this is a case "in which the police deliberately took advantage of an inherently coercive setting in the absence of counsel", *Brewer* v. *Williams*, 430 U.S. at 414, n. 2, and an affirmance or a finding of valid waiver of the right to counsel would substantially erode "the individual's effective representation by counsel". *Id.*, at 415 (Stevens, J.).

The showing necessary for a waiver of counsel has been equated to that required to show a waiver of the right to trial by jury, to confront one's accusers, or necessary to support a plea of guilty, *Boykin* v. *Alabama,* 395 U.S. 238 (1969). But there was no such waiver proven in this case.

CONCLUSION

The challenged confession arose after Edwards had been charged by criminal complaint, arrested, taken into custody and was awaiting arraignment and trial. The interrogation was not undertaken to seek additional

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[38] Edwards' tetimony at the Suppression Hearing also indicates confusion about the meaning of the word "statement". As is not surprising for a secret interrogation, the evidence of what, precisely, Edwards said and understood on that morning was not memorialized in any direct, contemporaneous record. *See* footnote 20, *supra.*

suspects or to solve the crime. The trial was "old and cold". Edwards knew when he was arrested that he needed the help of counsel, and he concluded that he would not make a statement until he had counsel's help. Whether based upon the Fifth and Sixth Amendment aspects of *Miranda* v. *Arizona,* 384 U.S. 436, or upon the Sixth and Fourteenth Amendment rights to the assistance of counsel at every critical stage leading up to the prosecution, to leave undisturbed what resulted in this case would be to stand by while "the secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights". *Spano* v. *New York,* 360 U.S. 315, 326 (1959) (Douglas, J., concurring). It is, therefore, respectfully requested that the judgment of the Arizona Supreme Court be reversed and that the case be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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Supreme Court, U.S.
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NO. 79-5269

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT EDWARDS, Petitioner

v.

THE STATE OF ARIZONA, Respondent

ON WRIT OF CERTIORARI TO
THE ARIZONA SUPREME COURT

PETITIONER'S SUPPLEMENTAL BRIEF

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ARGUMENT

PROSECUTION HAD COMMENCED AGAINST EDWARDS, AND THE RIGHT OF COUNSEL HAD THEREBY ATTACHED.

In its Answering Brief the State conceded that Edwards had been formally charged and that his Sixth Amendment right to counsel had arisen. Indeed, its second question presented for review was whether one who "has been formally charged" may waive his right to an attorney. The argument contained under that section of the Brief expressly acknowledged the same.[1] In the Court below, the State did not dispute the point.[2]

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[1] The State said:

> "The Petitioner notes that the rights afforded by *Massiah* apply whether or not the person has an attorney. *McLeod v. Ohio*, 381 U.S. 356 (1965). Respondent acknowledges that Petitioner's right to an attorney existed from the moment he was formally charged by the State on January 19, 1976". Brief for Respondent, p. 24, fn. 47.

[2] The Sixth Amendment issue, of the right to counsel for an accused who has been formally charged, was briefed to the Arizona Supreme Court. The State never asked that Court, which of course completely understood the method of commencing prosecution in Arizona by complaint, conclude that Edwards had no right to counsel because he had not been formally charged. *See* Appellant's Opening Brief in the Arizona Supreme Court, p. 15 *et seq.*; and Appellee's Answering Brief, p. 18 *et seq.*, discussing *Brewer v. Williams*, 430 U.S. 387 (1977), *Massiah v. United States*, 377 U.S. 201 (1964), and other authorities.

By Supplemental Brief, the State now contends that *United States v. Duvall*, 537 F.2d 15 (2d Cir. 1976), establishes that the Arizona complaint procedure does not constitute formal prosecution. *Duvall* is no precendent for what obtains under Arizona procedure. Indeed, the distinction is apparent for, under the Federal scheme of things, the complaint specified by Rule 3 of the Federal Rules of Criminal Procedure *cannot* commence prosecution. *See* United States Constitution, V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."); *United States v. Counts*, 471 F.2d 422, 425 (2d Cir. 1973) (prosecution for purposes of the statute of limitations does not begin until "the indictment is found or the information is instituted . . ., 18 U.S.C. §3282").

In Arizona, the significance of the complaint differs from that of the Federal procedures analyzed in *Duvall*. *See* Petitioner's Brief, p. 29-31, describing the Arizona Rules of Criminal Procedure at Issue, and particularly Rule 2.2 which specifies that "felony actions may be commenced

(a) by indictment . . . or (b) by the filing of a complaint . . . ." This case was begun by complaint.[3]

This Court, the Second Circuit, and the District of Pennsylvania all have held that State complaint procedures like that of Arizona begin formal prosecution, thus invoking the right to counsel.

In *Moore v. Illinois*, 434 U.S. 220 (1977), this Court, in a *Wade and Gilbert* case[4] reversed the Court of Appeals, which had concluded that the defendant's right to counsel arose only after the defendant was indicted. Reiterating that the right to counsel arose "'at or after the initiation of adversary judicial criminal proceedings', including proceedings instituted 'by way of formal charge [or] preliminary hearing'", 434 U.S. at 228, this Court held

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[3] In practice, it has become common in Arizona to take a case originally begun by complaint before the Grand Jury for a supervening indictment in order to avoid having to provide an open, preliminary hearing to the defendant. Ariz. R. Crim. P. 12.7(c), 17 Ariz. Rev. Stat. Ann. (1973), specifies the method of giving notice of the supervening indictment to "the defendant and his counsel" and was included, as the drafters' comment notes, for "those cases in which the defendant already has counsel appointed to represent him". *Ibid.* This is another indication that Arizona treats the complaint as the commencement of prosecution. This supervening indictment did occur in this case.

[4] *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

that the prosecution had been commenced under Illinois law when the victim's complaint was filed in court. *Ibid.*[5]

In *United States ex rel. Robinson v. Zelker*, 468 F.2d 159 (2d Cir. 1972), the Second Circuit held that prosecution had begun, and the accused had a right to counsel, after the information charging commission of a crime had been laid before a magistrate pursuant to Section 144 of New York's Code of Criminal Procedure.[6]

Finally, *United States ex rel. Burton v. Cuyler*, 439 F. Supp. 1173 (E.D. Pa. 1977), held that Pennsylvania's complaint procedure marked the commencement of prosecution for right to counsel purposes. By contrast, *Duvall*, interpreting Fed. R. Crim. P. 3, *could not* have held that the Federal complaint procedure was the beginning of prosecution, *Cf. United States v. Duvall, supra*, 537 F.2d at 21-22 (distinguishing *Duvall* from *United States ex rel. Robinson v. Zelker, supra*).

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[5] *See* Illinois Rev. Stat., ch. 38, §111-1 (1975) ("a prosecution may be commenced by (a) a Complaint; (b) an Information; (c) an Indictment.").

[6] Section 144 has been superseded by a new Section 100.05, which authorizes the State to commence a prosecution by an indictment *or* a felony complaint, among other methods. The Code Reviser's Practice Commentary notes: "The filing of the felony complaint in the lower court -- not the indictment in the superior court -- commences this action". New York Criminal Procedure Law §100.05 (McKinney 1971) (Practice Commentary).

Ultimately, of course, the particular circumstances of the case also demonstrate that prosecution had been commenced. *United States ex rel. Burton v. Cuyler, supra,* 439 F. Supp. at 1181.[7] The record, as already extensively described, fully demonstrates that the police had solved this case, had gotten the complaint to begin prosecution and were conducting the interrogation for the development of trial evidence.

The State of Arizona was right when it first agreed that formal prosecution had commenced.

Two other points need briefly to be made. First, the State cites twelve different cases on pages 3 and 4 and makes various waiver arguments with them. With very few exceptions, these cases have been discussed in the principal briefs on the merits, and most of them are completely distinguishable from this case.[8] Moreover, the State characterizes

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[7] "[C]onsistent with the focus of *Kirby* on the initiation of a prosecution, we take into account the other circumstances prior to the lineup which suggest that the true reason for holding the lineup was to enhance the prosecution's evidence and that no investigative purpose would have been impeded by insuring that relator had an opportunity to have counsel present." *United States ex rel. Burton v. Cuyler,* 439 F. Supp. 1173, 1181 (1977).

[8] For example, involving defendant initiated statements, *Arington v. Maxwell,* 409 F.2d 849 (6th Cir. 1969); *United States v. Thomas,* 474 F.2d 110 (10th Cir. 1973); or express, written waivers, *United States v. Cobbs,* 481 F.2d 196 (3rd Cir. 1973); *United States v. Mandley,* 502 F.2d 1103 (9th Cir. 1974).

the requirement for stronger proof of an understanding, intelligent waiver of the Sixth Amendment right to counsel as a rule of the Second Circuit; it ignores the fact that *this Court* imposed the strict standard for waiver of this right. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 404 (1977); *Schneckloth v. Bustamonte*, 412 U.S. 218, 238 (1973).

Secondly, because Edwards had once before been convicted of a crime, the State argues that when he was arrested on the present charges, and first attempted to talk for himself about making a deal, a waiver of his right to counsel was established, despite the heavy burden of proof imposed on the State.[9]

Yet, Edwards was given no information about the ramifications of the indictment, or the dangers and disadvantages of waiving his right to counsel. *Faretta v. California*, 422 U.S. 806, 835 (1975). And, of course, he did not voluntarily relinquish his right to counsel. He asked for it; he resisted interrogation; and he made statements after protesting that he did not want them used against him in court. He

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[9] Once again, the State makes the error of arguing that Edwards was given his *Miranda* rights four times, when he was not. Supplemental Brief, p. 4.

simply did not voluntarily substitute the jail house interrogation for the trial process.

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THE STATE OF ARIZONA, *Respondent.*

On Writ of Certiorari to the Arizona Supreme Court

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Once a suspect has been arrested and has asked for an attorney, may he later waive his right to an attorney prior to consulting with an attorney?

2. Once a person has been formally charged with an offense, may he waive his right to an attorney prior to consulting with an attorney?

3. Assuming that petitioner could waive his right to an attorney, did petitioner make an intelligent, knowing, and voluntary waiver of his right to an attorney?

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In the

Supreme Court of the United States

October Term, 1979

No. 79-5269

ROBERT EDWARDS, *Petitioner,*

v.

THE STATE OF ARIZONA, *Respondent.*

On Writ of Certiorari to the Arizona Supreme Court

BRIEF FOR RESPONDENT

OPINION IN THE LOWER COURT

The opinion of the Arizona Supreme Court is reported as *State v. Edwards,* 122 Ariz 206, 594 P.2d 72 (1979).

STATEMENT OF THE CASE

On October 9, 1974, at approximately 1:00 A.M., the La Conga Bar in Tucson was robbed at gunpoint by two individuals. While one of the robbers was forcing the owner, Mr. Carlos Mungia, to open the safe, Mr. Mungia died of a heart attack. Mr. Mungia was 70 years old at the time. Mrs. Nellie Esparza, the barmaid and the only other individual in the bar at the time, was unable to identify the two robbers. Sergeant Larry Bunting, who was head of the

homicide detail, assigned detective Victor Marmion as the officer in charge. The police investigated various leads, but were unable to make any progress in determining the identities of those responsible for the murder.

In July or August of 1975, the Tucson police arrested Cleveland (Kevin) Reed for grand theft, grand theft auto, and arson. (S.A. at 2, 61.)[1] At that time, Reed was also wanted in Kansas for armed robbery, possession of a firearm, and failure to appear. (S.A. at 4, 61.) In September 1975, Mr. Reed's attorney contacted the Pima County Attorney's Office, and said that Mr. Reed had information concerning the La Conga Bar murder. A deal was worked out whereby Mr. Reed (1) would tell all he knew about the La Conga Bar murder in exchange for immunity from any charges in connection with that crime, (2) would plead guilty to grand theft and the other two charges would be dropped, and (3) the sentence he received would run concurrent with the sentence he received for the Kansas charges. (S.A. at 3, 62-63.) Mr. Reed ultimately was sentenced to 3 to 4 years for the grand theft in Arizona, and to 5 to 99 years for armed robbery, 1 to 10 years for possession of a firearm, and 1 to 5 years for failure to appear, all in Kansas. (S.A. at 4, 61.)

On September 17, 1975, Mr. Reed gave his statement to the Tucson police. (S.A. at 3, 22.) He said that he and Petitioner Robert Edwards[2] robbed the La Conga Bar while Manuel Chiquete Soto, Willie Williams, and Albert Williams were outside acting as lookouts. The police then arranged to have Mr. Reed released so that he could go back on the street and try to develop more information about the La Conga Bar murder and some other nonrelated crimes. (S.A. at 22-23, 63.) Instead, Mr. Reed left for Kansas, where he was arrested. (S.A. at 63.) Mr. Reed was ultimately returned to Arizona.

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[1] J.A. at _____ refers to the Joint Appendix, and S.A. at _____ refers to the Supplemental Appendix.

[2] Although Robert Edwards is petitioner's real name, all of the codefendants and all of the police officers knew him as Willie Barefield.

By January 1976, the police decided that they had enough evidence to proceed against the others involved. On January 19, 1976, at approximately 1:00 p.m., Detective Victor Marmion and Detective Charles Milne arrested Manny Soto. Manny Soto gave them a statement wherein he implicated Edwards. At approximately 4:00 p.m., Sergeant Larry Bunting, Detective Steve Bunting,[3] and Officer Allen arrested Edwards. (J.A. at 31.) That evening, Edwards gave the police a statement wherein he denied any involvement in the crime. The next morning, he gave another statement wherein he admitted his part in the crime. It is the admission of this second statement that is before this Court.

In January 1977,[4] Edwards asked that he be allowed to conduct his own defense. The trial court conducted a hearing on this motion, and ultimately concluded that Edwards was competent to do so. It also provided Edwards with advisory counsel.

On March 4 and 7, 1977, the trial court held a hearing on the motion to suppress. This hearing was handled by Edwards' advisory counsel, Mr. Carmine A. Brogna. After the hearing, the trial court at first granted the motion to suppress, and then 3 days later reversed itself and ruled that the confession was admissible. On March 17, 1977, the first trial began, with Edwards representing himself. This resulted in a mistrial because the jurors were unable to reach a verdict. The second trial began April 18, 1977, again with Edwards representing himself. This resulted in a verdict of guilty of murder, burglary, and armed robbery. Edwards was originally sentenced to death for the murder charge, and to a term of 25 to 50 years for the burglary and armed

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[3] Sergeant Larry Bunting and Detective Steve Bunting are not related.

[4] The reasons for these delays are not presently before this Court.

robbery charges.[5] The matter was remanded for resentencing pursuant to *State v. Watson*,[6] and Edwards was resentenced to life for the murder.

The facts surrounding the confession come from three sources: (1) the motion to suppress, where Edwards, Sergeant Larry Bunting, Detective Victor Marmion, Detective Charles Milne, and Detective Paul Hallums testified; (2) the first trial, where Sergeant Bunting, Detective Marmion, and Detective Milne testified; and (3) the second trial, where Sergeant Bunting, Detective Marmion, and Detective Milne testified.[7] Edwards did not testify at either trial.

According to the officers, Edwards was arrested on January 19, 1976, at 4:00 p.m., by Sergeant Bunting, Detective Bunting, and Officer Allen. (J.A. at 31, 101, 146; S.A. at 6, 8.) Once Edwards was in the police car, Officer Allen read him his *Miranda* rights. (J.A. at 70.) The officers took him to the City of Tucson Police Station, where Sergeant Bunting interviewed him, and Detective Bunting witnessed the interview. (J.A. at 32.) Detective Bunting read Edwards his *Miranda* rights. (J.A. at 33, 102, 111; S.A. at 7.) Edwards said that he understood them, that he would waive them, and that he would answer questions. (J.A. at 33, 104; S.A. at 7.) Detective Bunting then showed Edwards a copy of the statement Cleveland Reed had given, and told Edwards that Manny Soto had also given a statement. (J.A. at 38, 104, 111, 147; S.A. at 15.) Edwards said that he too would give a statement, and gave what he described in his own words as an alibi statement. (J.A. at 34, 35, 107, 110,

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[5] By then, Willie Williams had defended himself, and was acquitted of murder, but found guilty of burglary and armed robbery. This conviction was affirmed in a memorandum decision. Manny Soto was convicted of murder, armed robbery, and armed burglary. This conviction was affirmed in an opinion. *State v. Soto*, 117 Ariz. 345, 572 P.2d 1183 (1977). Albert Williams was found incompetent, and was never tried.

[6] 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924 (1979).

[7] The testimony from the motion to suppress appears in the Joint Appendix at pages 30-90. The testimony from the two trials appears in the Joint Appendix at pages 95-155 and in the Supplemental Appendix.

146; S.A. at 8, 12.) Prior to this statement, Sergeant Bunting again advised Edwards of his *Miranda* rights. (J.A. at 45, 104; S.A. at 18, 20.) This statement was recorded on tape. (J.A. at 33; S.A. at 12.)

Shortly after Edwards gave this statement, Detective Paul Hallums saw Edwards in the police station. (J.A. at 34, 61.) Detective Hallums was assigned to the armed robbery detail, and wanted to talk to Edwards about an unrelated armed robbery. (J.A. at 61-62.) This conversation took place in the same room Sergeant Bunting had been using, and lasted about 5 to 10 minutes. (J.A. at 36, 62-63.) After he was finished, Detective Hallums asked Edwards if he would like to speak to Sergeant Bunting again, and Edwards said he would. (J.A. at 35, 62.) Detective Hallums then told Sergeant Bunting that Edwards wanted to talk further. (J.A. at 35.)

Edwards then told Sergeant Bunting that he had been around a while and knew how things worked, and wanted to make a deal. (J.A. at 36, 39, 40, 107, 111; S.A. at 9.) Edwards' proposal was that, if Sergeant Bunting would give him a deal, he would make a statement, but he would not indicate what the statement was about. (J.A. at 37, 112, 149; S.A. at 19.) Sergeant Bunting told Edwards that he could not give Edwards a deal, all he would do is give Edwards a chance to give his side of the story. (J.A. at 37, 39, 40; S.A. at 9.) The two of them went back and forth for about an hour discussing the request for a deal. (J.A. at 39, 40; S.A. at 10.) At some point, Detective Bunting informed Edwards that only the County Attorney could make a deal. (J.A. at 107.) Edwards then asked to speak to the County Attorney. (J.A. at 39, 44.) Sergeant Bunting contacted Deputy County Attorney Randy Stevens. (J.A. at 37-38, 107; S.A. at 10.) Edwards told Randy Stevens that he wanted a deal to give his side of the story. (J.A. at 107-08.) Edwards and Stevens were unable to reach an agreement. (S.A. at 9.) Ultimately, Edwards informed Sergeant Bunting that he would wait for an attorney before making a deal. (J.A. at 37, 38, 39, 41, 43, 151, 153; S.A. at 9, 20.) At no time did

Edwards say to Sergeant Bunting or any of the other officers that he would not talk to them until he spoke to an attorney. (J.A. at 39, 43-46, 148, 152, 153; S.A. at 18, 19-20.) At about 7:00 p.m., Sergeant Bunting had Edwards taken to the Pima County Jail.[8] (J.A. at 40, 90, 112; S.A. at 17-18.)

The next morning, Detective Marmion, the lead detective in the case, decided to go over to the Pima County Jail and talk to Edwards. (J.A. at 51, 134; S.A. at 24, 31, 34, 41.) He knew generally that Edwards had given an alibi statement, but he did not know the details of it. (J.A. at 51, 130; S.A. at 31.) Detective Marmion had with him his file of the case, including Manny Soto's taped confession, which Edwards had not yet heard. (J.A. at 56; S.A. at 34-35.) Detective Milne, who had been in the homicide division less than 5 months, had been assigned by Sergeant Bunting to accompany Detective Marmion as part of Detective Milne's educational process. (J.A. at 64-65, 140-41.) At approximately 9:15 a.m., Detective Marmion had Edwards brought to one of the interview rooms, which is where attorneys confer with their clients. (J.A. at 57, 66, 123.) Upon Edwards arrival, Detective Marmion identified himself and advised Edwards that he was working on the La Conga Bar case. (J.A. at 57.) He read Edwards his *Miranda* warnings, and asked if Edwards would like to talk to them. (J.A. at 57, 123, 141; S.A. at 24, 34.) Edwards said that he would, but first asked to hear Manny Soto's statement. (J.A. at 55, 57, 123, 134, 141; S.A. at 25, 34.) Detective Marmion then played about 9 to 12 minutes of Manny Soto's statement. (J.A. at 58, 123, 134; S.A. at 25.) Edwards then said that he would make an oral statement, but he did not want it taped. (J.A. at 53, 55, 58, 67, 123, 142; S.A. at 25, 37, 46, 53.) Detective Marmion carefully explained to Edwards that it did not matter whether it was oral or on tape, the two officers could testify in court about any statement that Edwards made. (J.A. at 53, 54, 58, 59, 67-68, 123-24; S.A. at

[8] Sergeant Bunting testified that he did not instruct anyone to put Edwards in solitary. (S.A. at 18.)

25, 37, 47, 52, 53.) Edwards said that he understood this, but he still did not want the statement on tape. (J.A. at 68-69, 142; S.A. at 25, 37, 47, 53.) Edwards then gave an oral statement wherein he admitted his involvement in the La Conga Bar murder. (J.A. at 124-25, 142-43; S.A. at 25, 27-28.)

After Edwards made this statement, an officer informed the detectives that someone was calling to advise them that Willie Williams had been arrested. (J.A. at 128; S.A. at 36.) Detective Milne left the room to take the telephone call. (S.A. at 39, 53.) When he returned, Edwards asked the detectives to return after they had talked to Willie Williams, and tell him what Williams had to say. (J.A. at 128; S.A. at 40, 43.) The detectives then left. When they got back to their car, they dictated what they remembered into a tape recorder. (J.A. at 58-59, 126, 136; S.A. at 35.) This tape was later transcribed as a supplemental report, and the tape erased.[9] (S.A. at 136.)

Edwards testified twice during the hearing on the motion to suppress, and gave testimony that was for the most part inconsistent with that given by the officers. The first time that he testified was on Friday, March 4, 1977. He admitted giving a taped statement to Sergeant Bunting on January 19, 1976. (J.A. at 48.) He admitted that Detective Marmion tried to get another statement from him the next day. (J.A. at 48.) He said that he did not ask Detective Marmion to come to see him, but he did not say anything about refusing to talk to anyone. (J.A. at 48.) At this point, Edwards said that he did not give a statement to Detective Marmion. (J.A. at 50.)

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[9] Sergeant Bunting testified that the tapes used to produce the police reports are used over and over, so it is standard practice to erase a tape once it has been transcribed and checked by the officer who made the report.

The following Monday, Edwards again testified, but this time he gave a much more detailed version of what happened. Edwards admitted that he had been read his *Miranda* rights, and stated that he understood what they meant. (J.A. at 71.) He admitted that he gave the taped statement to Sergeant Bunting. (J.A. at 71-72.) Edwards said that he requested to speak to an attorney, so Sergeant Bunting called an attorney and gave the telephone to Edwards. (J.A. at 73.) Edwards said that he asked the attorney who he was, and, when he found out that it was a "district attorney,"[10] hung up after about 3 or 4 seconds.[11] (J.A. at 73, 82.) Edwards said that Sergeant Bunting offered him a deal, but he said that he refused to talk about a deal before first talking to his attorney. (J.A. at 73-74.) Edwards said that the officers realized that he would not confess, so they had him taken to the jail. (J.A. at 75-76.) He said that one of the officers who had been interrogating him said, "Put him in solitary," but he was unable to remember which officer it was.[12] (J.A. at 76.) He said that he was placed in solitary with a "brother" named Al J. Carter.[13] (J.A. at 77.)

Edwards said that the next morning a detention officer came to get him, but he refused to come out of his cell and talk to anyone.[14] (J.A. at 77, 80.) Edwards said that, upon seeing Detective Marmion and Detective Milne, he told them that he did not want to talk to anyone. (J.A. at 78.) He did admit, however, that he said that he wanted to hear

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[10] Prosecuting attorneys in Arizona are County Attorneys, although many people refer to them as district attorneys.

[11] Randy Stevens was not called as a witness at either the suppression hearings or at the trials.

[12] Sergeant Bunting, Detective Marmion, and Detective Milne all testified that they did not know where Edwards was kept in the Pima County Jail. (J.A. at 135; S.A. at 18, 31, 51.)

[13] Edwards also refered to the officer who arrested him as a "brother." (J.A. at 81.) It appears therefore that he uses this term to describe fellow blacks, and not necessarily as a term of friendship.

[14] The state did not put on any of the detention officers, so this particular point was not contradicted by any of the state's evidence.

Manny Soto's tape. (J.A. at 78.) He then said that Detective Marmion offered to talk to the "D.A." and give him a break if he gave a statement. (J.A. at 79.) He said that he told Detective Marmion that he did not want anything used against him in court, but that he did not understand Detective Marmion's explanation. (J.A. at 79, 80.) He then admitted that he did give a statement to Detective Marmion. (J.A. at 79.) When asked why he did not admit making this statement when testifying the previous Friday, he said that he was "confused." (J.A. at 80, 83.)

Following the hearing, the trial court made a detailed explanation of its ruling on the motion to suppress. The trial court stated that it found the statements made by Edwards to be voluntary. (J.A. at 91, 92.) It stated that it found the testimony of the officers to be credible and that Edwards' was not. (J.A. at 91.) The trial court found that Detective Marmion went to the jail on January 30, 1976, on his own. (J.A. at 92.) The statement was admitted at trial, and Edwards was found guilty.

SUMMARY OF ARGUMENT

The resolution of this case depends on several important facts. On the day petitioner was arrested, he was advised of his rights on three separate occasions, and he said that he understood them. After he made an alibi statement, he told the officers that he had been around and knew how the system worked, and he wanted them to make him a deal. When the police officers would not make him a deal, petitioner said he would wait until he got an attorney before he made a deal. The next morning, two different officers went to see petitioner. They again advised petitioner of his rights, and he acknowledged that he understood his rights and said that he would talk to the officers. He then asked to hear the taped confession of one of his codefendants. After hearing this confession, petitioner made his incriminating statement.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court established that a suspect has a right to an attorney under the Fifth and Sixth Amendments once he is arrested. This Court did not, however, establish a rule that, once a suspect has asked for an attorney, he may not change his mind and make a statement prior to seeing an attorney. All of the Circuit Courts that have addressed this issue have rejected this *per se* rule. The rule that they do adopt is that a suspect may change his mind and waive his right to an attorney as long as there is an intelligent, knowing, and voluntary waiver.

In *Brewer v. Williams*, 430 U.S. 387 (1977), this Court reiterated that a person has the right to counsel under the Sixth and Fourteenth Amendments once he has been formally charged with a crime, but this Court also indicated that this right may be waived without notice to counsel. The Circuit Courts that have addressed this issue have agreed that such a waiver is possible, again as long as it is an intelligent, knowing, and voluntary waiver.

The record in this case shows a clear waiver of these rights. Petitioner knew his rights, and never said to the police that he would not talk to them until he spoke to an attorney. Prior to making the incriminating statement, petitioner was again advised of his rights, and made an intelligent, knowing, and voluntary waiver of them.

ARGUMENT

I. Once a Suspect Has Asserted His Right to an Attorney, He May Later Waive That Right Prior to Seeing an Attorney.

Petitioner contends that, once a suspect has been advised of his rights under *Miranda v. Arizona*,[15] and has requested an attorney, he may never waive that right until he consults with an attorney, and any statement made prior to consultation with an attorney is *per se* inadmissible. The Circuits Courts that have addressed this issue have held

[15] 384 U.S. 438 (1966).

that there is no such *per se* rule. *White v. Finkbeiner*, 611 F.2d 186 (7th Cir. 1979); *Nash v. Estelle*, 597 F.2d 513 (5th Cir.) (en banc), *cert denied*, 444 U.S. 981 (1979); *United States v. Hauck*, 586 F.2d 1296 (8th Cir. 1978), *cert. denied*, 441 U.S. 947 (1979); *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.) (en banc), *cert. denied*, 436 U.S. 919 (1978); *United States v. Grant*, 549 F.2d 942 (4th Cir.), *cert. denied*, 432 U.S. 908 (1977); *Cobbs v. Robinson*, 528 F.2d 1331 (2d Cir. 1975), *cert. denied*, 424 U.S. 947 (1976).[16] For the following reasons, respondent asks this Court to reject the *per se* rule, and instead adopt a rule that a suspect may later waive his right to an attorney, even though he has previously requested one, provided the subsequent waiver is shown to be intelligently, knowingly, and voluntarily made.

In *White v. Finkbeiner, supra*, White was arrested on an unrelated charge, and read his *Miranda* rights. When the officer attempted to question White, he said, "I'd rather see an attorney." The officer thereupon stopped any questioning. Over the next 2 days, White was questioned by several officers other than the one whom he first advised of his desire for an attorney. Before each of these subsequent interrogations and admissions, the officers advised White of his *Miranda* rights, and White signed waiver forms. White challenged these later confessions as a violation of his right to an attorney as provided in *Miranda*.

The court first held that White's statement "I'd rather see an attorney" was a request sufficient to invoke his right to an attorney under *Miranda*. It then addressed the question of a subsequent waiver. It began by looking at the purpose behind *Miranda* and *Michigan v. Mosley*,[17] and determined that a *per se* rule would be going too far toward protecting a suspect's rights. The *per se* rule would im-

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[16] The Sixth Circuit, in *Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978), found that there had been a refusal to stop questioning after a request for an attorney, so it did not have to face the question of a *per se* rule. *See also United States v. Charlton*, 565 F.2d 86 (6th Cir. 1977).

[17] 423 U.S. 96 (1975).

prison a person in his own privilege. It would lose touch with the purpose and policy behind *Miranda*—a knowing and free exercise of constitutional rights. Finally, it would lead to a mechanical approach to the resolution of the issue. The court chose instead to adopt a case-by-case approach wherein it would look at the particular facts of the case to see if there was a knowing and voluntary waiver.[18] This determination would be pursuant to the traditional considerations set forth in *Johnson v. Zerbst*.[19]

In *United States v. Hauck, supra,* an F.B.I. agent interviewed Hauck while he was incarcerated in a part of the South Dakota prison system. Hauck was suspected of sending threatening letters to a state judge. The agent advised Hauck of his *Miranda* rights, and later asked Hauck for a handwriting sample. Hauck asked for an attorney, and then asked when he would get one. After the agent explained the procedure for obtaining an attorney, Hauck said that retaining an attorney seemed like too much trouble, and proceeded with the interview.

Hauck challenged his confession as a violation of *Miranda,* and pointed to the language in *Miranda* that says that all interrogation must stop once there has been a request for an attorney. 384 U.S. at 474. The court acknowledged this, but noted the language following this that says, if the interrogation continues without the presence of an attorney, the state must carry the heavy burden of showing that there was a knowing and intelligent waiver of the right to remain silent and the right to an attorney. 384 U.S. at 475. The court concluded that Hauck affirmatively withdrew his request for an attorney.

In *United States v. Rodriguez-Gastelum, supra,* customs officers stopped Rodriguez-Gastelum, advised him of his *Miranda* rights, questioned him, and then arrested him. After being taken to the Drug Enforcement Administration Office, he was again questioned. The officer first read him

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[18] *Accord, Kennedy v. Fairman,* 618 F.2d 1242 (7th Cir. 1980).

[19] 304 U.S. 458 (1938).

his *Miranda* rights, and asked him if he would talk. He answered, "Okay, okay, but with an attorney." The officer said, "Do you want to talk to me now without an attorney?" Rodriguez-Gastelum said, "That's fine." Rodriguez-Gastelum contended that his request for an attorney was disregarded, and the continued questioning deprived him of his Sixth Amendment right to assistance of counsel.

For purposes of the appeal, the court assumed that the response, "Okay, okay, but with an attorney" was sufficient to invoke the protection of the Fifth Amendment and Sixth Amendment under *Escobedo v. Illinois*,[20] and *Miranda*. It then rejected the *per se* rule, and instead adopted a case-by-case approach, which would allow district courts to analyze the facts in each particular case.[21] In rejecting the *per se* rule, the court relied upon the following reasoning: (1) the *per se* rule is contrary to the whole spirit of *Mosley*; (2) the *per se* rule would "imprison a man in his privileges";[22] and (3) the *per se* rule would force courts to lose touch with the whole purpose of *Miranda*, that is, whether there was an intelligent, knowing, and voluntary waiver. Based upon this reasoning, the court concluded that the answer "That's fine" was sufficient to constitute a waiver of the prior request for assistance of counsel.

In *United States v. Grant, supra*, police arrested Grant in connection with a local bank robbery. An F.B.I. agent advised Grant of his *Miranda* rights; Grant signed the waiver and gave a statement denying any involvement in the robbery. Some time later, the agent learned that Grant was charged with robbing a Richmond bank. The agent advised Grant that he was under arrest for the Richmond robbery, and again advised him of his *Miranda* rights. Grant asked for an attorney, so the agents did not question

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[20] 378 U.S. 478 (1964).

[21] *Accord, United States v. Evans*, 575 F.2d 1286 (9th Cir.), *cert. denied*, 439 U.S. 854 (1978); *United States v. Wilson*, 571 F.2d 455 (9th Cir. 1978); *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), *cert. denied sub nom. Inciso v. United States*, 429 U.S. 1099 (1977).

[22] *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942).

him further. Grant then asked about the procedure to get an attorney, and the agents answered these questions. As the agents were about to leave, Grant suddenly said, "It's all true." The agents warned him again of his rights, and reminded him that he had requested an attorney. Grant said that he knew his rights, and that he wanted to make a statement. Grant claimed that his statements were taken in violation of his right to counsel under *Miranda*.

The court rejected this claim, and held that *Miranda* did not erect a *per se* bar to all conversation after a suspect has asked for counsel. The court did place considerable reliance on the fact that Grant initiated the discussion, and seemed to indicate that it would not hold admissible a statement made at the instigation of the officers.

In *Cobbs v. Robinson, supra,* police arrested Cobbs and advised him of his *Miranda* rights both at the time of arrest and again at the police station. The officers said that they had enough information against him, so they did not need a statement. One of the officers did reveal some of the facts known to them, and Cobbs then said that he wanted to talk to an attorney before he told them what had actually occurred. Instead of calling an attorney, however, Cobbs called his grandmother. After he spoke to her, he gave a confession to the police. Cobbs claimed that this confession was admitted in violation of his rights to an attorney under *Miranda*. The court rejected this claim. It held that Cobbs was fully and timely advised of his rights, that he was aware of them and understood them, and that he acted fully and voluntarily, and knowingly and intelligently waived his right to remain silent.

The cases cited by petitioner do not lend support for his position. They address the situation where a suspect requests an attorney, but the police continue questioning the suspect in spite of the request. In *Thompson v. Wainwright,*[23] the police arrested Thompson and advised him of his *Miranda* rights. Thompson said that he would

[23] 601 F.2d 768 (5th Cir. 1979).

make a statement, but first he wanted to talk to an attorney. The officer told Thompson that the attorney could not relate Thompson's story to the police, and said that the attorney would probably tell Thompson to say nothing. Thompson then proceeded to give the police a statement. The court held the confession inadmissible. It noted that the police did not honor Thompson's request for an attorney (and therefore his request to remain silent), and instead by presumption and persuasion got Thompson to incriminate himself. The court held that Thompson was misled into abandoning his request for counsel. This case therefore does not say that there could not be a subsequent knowing and intelligent waiver of counsel; it merely says in that case there was none.

In *Nash v. Estelle*,[24] the court held that, once a suspect has made an unequivocal request for counsel, all interrogation must stop. If the suspect makes an equivocal request for counsel, further questioning is permitted only to the extent necessary to determine exactly what the suspect meant by his request. The dissent noted that the rule in the Fifth Circuit did not prohibit a suspect from later withdrawing his previous request for an attorney:

> Our version of the *per se* rule falls between two extremes sometimes urged. We will not permit inquiry as to waiver *unless there has been a temporal break* in the custodial interrogation after the request for counsel and before the purported waiver. *Contra Wilson v. Henderson* (inquiry as to waiver permitted in all circumstances). On the other hand, where there has been such a temporal break, we will inquire into whether there has been an effective waiver *even if the purported waiver comes before the suspect has actually consulted with an attorney.*

[24] 597 F.2d 513 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979).

597 F.2d at 520 n.2 (emphasis added) (Godbold, J., dissenting).[25] This case therefor does not create a *per se* rule. Indeed, this case has been cited as authority for rejecting the *per se* rule proposed by petitioner. *White v. Finkbeiner, supra,* 611 F.2d at 192.

In *United States v. Massey,*[26] Massey told the agents on three different occasions that he did not want to talk about the crime. One of the agents told Massey that he did not want to discuss the crime, he only wanted to know about Massey's itinerary over the last 2 months. Massey signed a waiver, and gave the agent this information. This information was used to convict Massey. The court held that the agents had tricked Massey into waiving his right to an attorney. It therefore did not hold that a suspect cannot make a knowing and voluntary withdrawal of a previous request for counsel, it merely held in that case this did not happen.

In *United States v. Womack,*[27] police arrested Womack and advised him of his *Miranda* rights. He then requested an attorney. When Womack was being booked, he again asked for an attorney, and was told that "it would be taken care of." The next morning, an officer came to Womack's cell and again read him his *Miranda* rights. Womack did not renew his request for counsel because he was "scared" and because "every time I asked for one I never got one, so I gave up on the fact." The court held that "an accused may waive a previously-invoked right to counsel." 542 F.2d at 1050.[28] The court held that the waiver Womack made was not a knowing, intelligent, and voluntary waiver because Womack was under the impression that he would not be able to get an attorney.

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[25] *Accord, Blassingame v. Estelle,* 604 F.2d 893 (5th Cir. 1979); *see United States v. Brown,* 569 F.2d 236 (5th Cir. 1978) (en banc).

[26] 550 F.2d 300 (5th Cir. 1977).

[27] 542 F.2d 1047 (9th Cir. 1977).

[28] *Accord, United States v. Jackson,* 436 F.2d 39 (9th Cir. 1970), *cert. denied,* 403 U.S. 906 (1971).

In *United States v. Clark*,[29] F.B.I. agents arrested Clark pursuant to a warrant, advised him that he was a suspect in a bank robbery, and advised him of his *Miranda* rights. Clark refused to make a statement. At 4:30 p.m., two agents confronted Clark, again advised him of his *Miranda* rights, and asked him if they could interview him. Clark said, "I had better talk to a lawyer." At 8:00 p.m., the same agents went back to fingerprint Clark. Again they tried to get Clark to talk, but he again said that they must have made a mistake and arrested the wrong person. The agents then told Clark that he should talk to them if he had nothing to hide, and also said that his friend English had confessed and implicated him. Clark then refused to sign a waiver, but did agree verbally to submit to questioning without an attorney present. The court recognized that, "under given circumstances, an accused may later waive a right which he previously asserted." 499 F.2d at 807. It held that the fact that an accused has previously asserted his right to an attorney weighs heavily against a finding of a later waiver. It also held that initiation of an interview by the agents is a strong indication of an involuntary waiver. It then held that there had not been a voluntary waiver of Clark's Fifth Amendment right.

In both *United States v. Blair*,[30] and *United States v. Priest*,[31] the suspects were advised of their *Miranda* rights; they then asked for attorneys. In both cases, the officers ignored the request for an attorney, and continued asking questions. While these cases show a clear violation of the rights delineated in *Miranda*, they do not address the issue before this Court, that is, whether there can be a subsequent waiver of the right to an attorney once the suspect has requested one.

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[29] 499 F.2d 802 (4th Cir. 1974).

[30] 470 F.2d 331 (5th Cir. 1972), *cert. denied sub nom. Crews v. United States*, 411 U.S. 908 (1973).

[31] 409 F.2d 491 (5th Cir. 1969).

As did the question in *Mosley*, resolution of this issue turns on the interpretation of the language contained in the *Miranda* opinion:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.
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> . . . .
>
> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

384 U.S. at 473-75 (footnote omitted). In *Mosley*, this Court noted that, although the passage states that "the interrogation must cease" when a person in custody indicates that "he wishes to remain silent," it does not state under what circumstances, if any, a resumption of questioning is permissible. 423 U.S. at 101. This Court then held that the passage did not create a "*per se* proscription of indefinite duration upon any further questioning by any police officer on any subject . . . ." 423 U.S. at 102-03. The same can be

said about the language that says that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. at 474. The language does say that the interrogation may resume once an attorney is present, but it *does not* say that the interrogation *may not resume* under any other circumstances. Moreover, the following passage seems to negate the interpretation that interrogation may never be resumed unless an attorney is present:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently *waived his privilege against self-incrimination* and *his right to retained or appointed counsel.*

384 U.S. at 475 (emphasis added). Because this language appears one paragraph after the paragraph discussing what must happen once a suspect has either requested to remain silent or requested an attorney, it seems logical that the phrase "[i]f the interrogation continues" refers to the interrogation continuing after either a request to remain silent or a request for an attorney. This is the analysis that the Eighth Circuit followed in rejecting the *per se* rule.[32]

Allowing a subsequent waiver in both cases is both logical and consistent. If a suspect indicates he wishes to remain silent, the police cannot interrogate him until he changes his mind and decides that he does not want to remain silent. If a suspect indicates he wants an attorney, the police cannot interrogate him until he changes his mind and decides that he does not want an attorney. In both cases the analysis would be the same: was the subsequent waiver intelligently, knowingly, and voluntarily made. To make this determination, the courts would look at the usual factors, such as intelligence, experience, and adequacy of explanation of the right. It would also consider additional factors, such as amount of time between the assertion of the right

[32] *United States v. Hauck*, supra, 586 F.2d at 1298.

and the subseqent waiver and whether the police or the suspect initiated the subsequent contact, in order to determine whether the change was voluntarily made, or was a product of overbearing on the part of the police. This approach would thus be in keeping with the recent cases of *Fare v. Michael C.*,[33] and *North Carolina v. Butler*,[34] which both held that the question whether the accused waived his rights is not one of form, but rather whether the accused in fact knowingly and voluntarily waived the rights delineated in *Miranda*.[35]

Petitioner would instead have this Court adopt an inflexible *per se* rule that would exclude all confessions until an attorney is consulted. This rule would be directly contrary to the language of *Miranda*, which provides that volunteered statements are not barred by the holding of that case.[36] Petitioner supports his argument with the claim that a suspect who asks for an attorney has made the determination that he is not capable of dealing with the police and needs an attorney to deal with them. While this may be true in some cases, it may not be true in all cases, which is a major defect in any *per se* rule. The effect would be to say that a suspect who is intelligent enough to realize that he needs an attorney is suddenly no longer intelligent enough to reconsider his position.

Petitioner also argues that, if this Court chooses not to adopt an absolute *per se* rule, it should at least adopt a rule that a subsequent waiver of the previously invoked right is not permissible if the police initiated the contact that led to the subsequent waiver. As noted by the court in *United*

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[33] 442 U.S. 707 (1979).

[34] 441 U.S. 369 (1979).

[35] 442 U.S. at 724; 441 U.S. at 373.

[36] 384 U.S. at 478. The Fifth Circuit, in *United States v. Carpenter*, 611 F.2d 113 (5th Cir. 1980), held admissible a confession that Carpenter voluntarily made after he had asked for an attorney, but before he had seen one.

States v. Rodriguez-Gastelum, supra:

> Such a reading, in practical effect and under a different guise, reincorporates the *per se* rule that a majority of the court has today rejected.

569 F.2d at 488. Under the totality of the circumstances approach that respondent advocates, whether the contact was initiated by the police or by the suspect would be only one of the circumstances the trial court would have to consider. While, in many circumstances, initiation of the contact by the police might be a strong indication that the subsequent waiver was involuntary, it cannot be said that, in all circumstances, the subsequent waiver would be involuntary. The test proposed by petitioner would, however, have this effect—it would amount to a judicial determination that any subsequent waiver that followed police-initiated contact was involuntary as a matter of law, regardless of what the facts were. Respondent urges this Court to reject this approach, and instead adopt one that would allow the trial court to look at the facts, and from the facts determine if the waiver was in fact voluntary.

Allowing the police to initiate contact after a request for counsel raises another issue—the scope of permissible police conduct prior to any subsequent waiver. Under the rule proposed by respondent, once a suspect has asked for an attorney, he may not be interrogated until he either gets an attorney or changes his mind and withdraws his request for an attorney. Clearly, then, if the police conduct that leads to the change of mind by the subject amounted to interrogation, it would not be permitted.[37] In the recent case of *Rhode Island v. Innis*,[38] this Court defined "interrogation" as follows:

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or

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[37] *See generally*, Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?* 67 GEO. L.J. 1 (1978).

[38] _____ U.S. _____, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

> actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

_____ U.S. at _____, 100 S. Ct. at 1689, 64 L. Ed. 2d at 308. In the case presently before this Court, respondent submits that the conduct of the officers did not amount to interrogation. At the meeting on January 20, 1976, the first thing Detective Marmion did was introduce himself, tell petitioner that he was working on the La Conga Bar murder, and then say that he wanted to talk to petitioner.[39] This much cannot be considered as "interrogation" because no one would believe that a suspect would suddenly break down at this point and confess. The next thing that Detective Marmion did was advise petitioner of his rights pursuant to *Miranda*.[40] Again, it is unlikely that a suspect will confess merely because the policeman read him his *Miranda* rights. The next thing that happened was that petitioner said that he would talk to the detectives and asked to hear Manny Soto's taped confession.[41] Assuming for the moment that Detective Marmion has instead *told* petitioner that he (Marmion) was going to play the tape, it could be argued that this act amounted to "interrogation" because the officer believed that this act was "reasonably likely to elicit an incriminating response from the suspect."[42] Respondent submits that it goes too far to consider as interrogation the mere presentation of evidence to a suspect. First of all, the presentation of evidence to a suspect is not subject to police trickery—either the police have

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[39] J.A. at 57.

[40] *Id.*

[41] *Id.*

[42] Professor Kamisar would consider it as such. *See* Kamisar, *supra* note 37, at 14-24.

the evidence or they do not.[43] Second, the presentation of evidence to a suspect is essential to an intelligent, knowing, and voluntary exercise of his rights—until the suspect knows what evidence the police have, he cannot make an intelligent determination whether to talk to them.[44] Third, the presentation of evidence may be a procedure "normally attendant to arrest and custody" as part of the investigative process. Police therefore should not be precluded from presenting evidence to the suspect for consideration.

Even if the presentation of evidence to a suspect were to be equated with "interrogation," this would not help petitioner in this case. Detective Marmion first advised petitioner of his *Miranda* rights.[45] Petitioner then said he would talk to the detectives, and *asked* to hear the tape.[46] There was therefore no interrogation without a prior waiver by petitioner.

Based upon the above authorities and reasoning, respondent urges this Court to reject a *per se* rule, and instead adopt one that would look at the totality of the circumstances, as all of the Circuit cases cited above have done. This rule would focus on the critical question that has confronted the courts in every case since *Miranda*—was there an intelligent, knowing, and voluntary waiver of a constitutional right.

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[43] By this, respondent in no way intends to condone the practice of informing the suspect that the police have evidence that they in fact do not have. If such a practice led to a waiver, any such waiver would clearly not be an intelligent, knowing, and voluntary waiver.

[44] In *Carvey v. LeFevre*, 611 F.2d 19 (2d Cir. 1979), the court held that failure to advise Carvey of an indictment against him made the waiver of counsel ineffective because it was not intelligent, knowing, and voluntary.

[45] J.A. at 57.

[46] *Id.*

ARGUMENT

II. Once a Person Is Charged With a Crime and Is Therefore Entitled to an Attorney, He May Waive That Right Prior to Seeing an Attorney.

Petitioner contends that the questioning by the detectives was a violation of his Sixth Amendment right to counsel under *Massiah v. United States,*[47] *Escobedo v. Illinois,*[48] *Brewer v. Williams,*[49] and *United States v. Henry.*[50] This Court indicated in *Williams* that this Sixth Amendment right to counsel may be waived:

> The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not,* without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not.

430 U.S. at 405-06 (emphasis original, footnote omitted).

> [O]nce [the right to assistance of counsel] attached (it is conceded that it had in this case), the state could not properly interrogate Williams in the absence of counsel unless he voluntarily and knowingly waived the right . . . .

430 U.S. at 410 (Powell, J., concurring). The Second Circuit, in *Carvey v. LeFevre,*[51] has specifically held that such a right can be waived:

> A person comes under the protection of the sixth and fourteenth amendment right to counsel from the moment judicial proceedings are initiated against him,

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[47] 377 U.S. 201 (1964). Petitioner notes that the rights afforded by *Massiah* apply whether or not the person has an attorney. *McLeod v. Ohio,* 381 U.S. 356 (1965). Respondent acknowledges that petitioner's right to an attorney existed from the moment he was formally charged by the state on January 19, 1976. It is respondent's position that petitioner effectively waived this right prior to making any statement.

[48] 378 U.S. 478 (1964).

[49] 430 U.S. 387 (1977).

[50] _____ U.S. _____ (1980) No. 79-121.

[51] 611 F.2d 19 (2d Cir. 1979).

> "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Statements elicited from the accused by the police after this point without the presence or aid of a lawyer may not be used against him at trial unless the state can show that he knowingly, voluntarily and intelligently waived his right to counsel.

611 F.2d at 21 (citations omitted).[52] Based upon the reasoning in Argument I, supra, respondent asks this Court to rule that petitioner could and did waive his Sixth Amendment right to an attorney.

This does raise the question whether the Sixth Amendment right to counsel under *Massiah* is different from the Sixth Amendment right to counsel under *Miranda*, and whether the question of waiver should be judged under the same or different standards. Respondent submits that, whether the right is under *Massiah* or *Miranda*, the waiver should be judged under the same standard as any waiver of any other constitutional right—was it a knowing, voluntary, and intelligent waiver.

Petitioner appears to be arguing for a rule that would not allow a waiver until a suspect has met with counsel, or else a rule that interrogation could not take place except in the presence of counsel. Petitioner does not cite any authority for either of these rules. Petitioner argues that, because of counsel's absence at his interrogation, he was unable to present his version of what happened. Petitioner overlooks the fact that he himself insisted that the detectives not tape record the conversation. This would have allowed the trial court and the jury to hear what *actually* happened, and would have eliminated the problem of determining whether

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[52] *Accord, United States v. Springer*, 460 F.2d 1344, 1350 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972); *Coughlan v. United States*, 391 F.2d 371, 372 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968).

petitioner's version or the detectives' version was correct. In the same way that petitioner waived his right to have the conversation taped, he waived his right to have an attorney present.

Petitioner argues that, because he made a confession, he lost a bargaining advantage that he could have used to plead his way to a reduction of charges. What petitioner seems to be arguing for is a constitutionally protected right to use a confession for plea bargaining purposes. To the extent that this argument has any validity, it would apply equally to confessions obtained after a waiver of *Miranda* rights or *Massiah* rights. In light of the often repeated pronouncement that "[c]onfessions remain a proper element in law enforcement,"[53] it seems inappropriate to now remove them as an element of law enforcement and make them a tool for the suspect to use to escape responsibility for his crimes.

ARGUMENT

III. The Fourteenth Amendment Creates No Prohibition to Interviewing a Person Once He Has Waived His Right to an Attorney.

Petitioner contends that the general notions of fundamental fairness and due process prohibit the police from interviewing a person charged with a crime until he has consulted with a lawyer. Petitioner did not raise this issue below, and is therefore precluded from raising it here. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Moreover, as noted in Argument II, *supra*, this Court indicated in *Williams* that any rights under the Fourteenth Amendment may be waived without notice to counsel,[54] and the Second, Seventh, and Ninth Circuits have specifically held this to be the rule.[55] Petitioner seems to be arguing that a suspect is entitled to more protection once he is formally

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[53] *Miranda v. Arizona*, supra, 384 U.S. at 478.

[54] 430 U.S. at 405-06.

[55] *Carvey v. LeFevre*, supra; *United States v. Springer*, supra; *Coughlan v. United States*, supra.

charged. He says that this is necessary to "even the odds." But this Court in *Escobedo* and *Miranda* held that a person is entitled to assistance of counsel from the moment he is arrested. If the odds are uneven, they are just as uneven before a person is formally charged as they are after he is charged. And a confession is just as incriminating before a person is charged as it is after he is charged. A logical extension of petitioner's argument is that no confessions would be permissible until a person has consulted with an attorney. This Court has not chosen to adopt such a rule in the past, and petitioner has not shown any reason why this Court should do so now.

ARGUMENT

IV. The Record Fully Supports the Determination of the Trial Court That Petitioner Intelligently, Knowingly, and Voluntarily Waived His Right To Remain Silent and His Right to an Attorney.

Petitioner contends that the record does not support the ruling of the trial court that petitioner intelligently, knowingly, and voluntarily waived his right to remain silent. While this Court has the duty to determine if there was a waiver as a matter of constitutional law, factual determinations and resolution of disputed issues are more properly the province of the trial court, sitting as the finder of fact.[56]

On the day petitioner was arrested, he was informed of his rights three times: at the time of his arrest, at his arrival at the police station, and prior to his taped statement. Petitioner specifically told the officers that he understood his rights. At trial, petitioner presented a psychiatrist, who testified that petitioner's level of intelligence was such that he could understand what the *Miranda* rights meant, and could understand the concept that anything he said could

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[56] See *Brewer v. Williams*, supra, 430 U.S. at 395-97, 402-04. The trial court specifically noted that it believed the officers' testimony, and it did not believe petitioner's testimony. (J.A. at 91.)

be used against him. After petitioner made his taped statement, he told Sergeant Bunting that he had been around and knew how the system worked. Petitioner had been previously convicted of robbery and sentenced to prison, and was therefore not exactly a stranger to the system. After going back and forth for over an hour about making a deal, when petitioner said that he wanted an attorney before he would talk about a deal, Sergeant Bunting stopped questioning him. All of these factors show a clear understanding on the part of petitioner of the protection that *Miranda* and *Massiah* gave him, and the nature of the rights he had.

In viewing the conduct of the officers on January 20, 1976, several factors are important. At no time during petitioner's discussion with the officers on the day of his arrest did he ever say to them that he did not want to talk further until he had first talked to an attorney. Sergeant Bunting never interpreted petitioner's remarks as such a request. Petitioner was questioned for 3 hours that night, was sent to the jail at 7:00 p.m., and was not contacted again until 9:15 the next morning. Sergeant Bunting did not send Detective Marmion over to the jail the next day, Detective Marmion went on his own accord as part of his duties as lead detective on the case. Detective Marmion had with him Manny Soto's tape, which petitioner knew about but had not heard the night before. The detectives met with petitioner in one of the rooms used by attorneys to discuss cases with their clients. Upon entering the room, petitioner was again advised of his rights. Petitioner did not say to the detectives that he did not want to talk to them, and did not ask for an attorney. To the contrary, he said that he would talk to them, and asked to hear Manny Soto's tape. After hearing the tape, he freely and voluntarily made a statement.

Petitioner points to several things that he claims make the statement involuntary. In viewing these claims, it must be remembered that the trial judge, who had the opportunity to view petitioner while he was testifying, did not

believe petitioner.[57] Petitioner claims that he was taken from the police station and put in solitary in the Pima County Jail. All of the officers who testified said that they did not know where petitioner was being kept at the jail. From this it appears that neither Sergeant Bunting, Detective Marmion, nor any of the other officers working on the case had anything to do with where petitioner was being kept. Additionally, petitioner was not in "solitary" as such, he was with a "brother" named Al J. Carter. Finally, petitioner never claimed that this night he spent in solitary had any coercive effect on him when he made his statement, and there is no evidence in the record that it had such an effect.

Petitioner claimed that he told the detention officer that he did not want to come out of his cell. He also claimed that he told the detectives that he did not want to speak to them. Both detectives testified that petitioner never told them that he did not want to talk to them. The trial judge did not believe petitioner, and specifically found that Detective Marmion did nothing wrong, and found that there was no compulsion or anything of that kind used on petitioner.[58] Assuming that it is true that petitioner told the detention officer that he did not want to talk to the detectives, the facts as found by the trial judge were that he never told this to the detectives, and that they did not know of this statement by petitioner, if in fact he did actually make it. The record clearly supports the finding of the trial court that petitioner's incriminating statement was freely and voluntarily made, and that there was no compulsion or coercion used by the detectives.

Petitioner claims that he did not ask for an attorney the morning of January 20, 1976, because "I didn't think you had to keep asking for an attorney over and over and

[57] J.A. at 91.

[58] J.A. at 92.

over."[59] All of the officers who testified said that petitioner never, at any time, asked for an attorney, or said that he would not talk until he saw one. Since petitioner did not ask for an attorney in the first place, it seems strange that he would view the matter in terms of asking over and over and over. This appears to be another one of petitioner's inconsistent statements that the trial court did not believe.

Petitioner makes much of the fact that he told the detectives that he did not want the statement recorded because he did not want it used in court. A similar situation occurred in *United States v. Charlton*,[60] where the suspect agreed to talk provided it was "off the record." The court rejected the contention that this made the statement inadmissible:

> There is no evidence that any of the officers ever promised such confidentiality to his statements. The rights which *Michigan v. Mosley* commands be "scrupulously honored" do not in our judgment include a right to control the use of a statement which is otherwise voluntarily given with full knowledge of its potential incriminatory value.

565 F.2d at 90 n.2. This same reasoning was used to reject a similar admissibility argument in *Kennedy v. Fairman*:[61]

> Petitioner contends that he did not waive any rights by telling the officers that he was willing to talk; rather, he made statements to the police under the erroneous assumption that because he had no attorney present, nothing he said could be used against him. We do not find this argument persuasive.

618 F.2d at 1248. In this case, petitioner on four occasions was advised that anything he said could be used against him. The psychiatrist who examined him said that his intelligence was such that he would be able to understand the

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[59] J.A. at 84.

[60] 565 F.2d 86 (6th Cir. 1977), *cert. denied sub nom. Jacek v. United States*, 434 U.S. 1070 (1978).

[61] 618 F.2d 1242 (7th Cir. 1980).

Miranda rule and know that anything he said could be used against him.[62] Detective Marmion testified that he knew a statement would not be admissible if petitioner did not understand, so he "wanted to be sure [petitioner] understood what was going on, that he voluntarily waived his right, that he understood it would be used against him."[63] In petitioner's own words, he had been around and knew what was going on.[64] Petitioner knew that, once he had made a statement on tape, he could no longer deny that he made it. On the other hand, if he later wanted to deny that he made the statement and it was not on tape, he could deny it, and it would be his word against the detectives' word. That clearly was his ultimate strategy. He told his original attorney, David Hoffman, that he never made the second statement, and told Hoffman to make the police officers produce some tape recording or written record of the statement.[65] At the first day of the voluntariness hearing, petitioner denied that he made the second statement.[66] And finally, during closing argument, petitioner told the jurors that, because the detectives did not have any written or recorded proof that he made a statement, that meant that he did not make a statement.[67] The record clearly shows that petitioner knew how the system worked, and tried to manipulate it to his advantage. This is not a case of an unknowing person overwhelmed by the system. Petitioner knew what his rights were, knew what he was doing, and made an intelligent, knowing, and voluntary waiver of his right to an attorney and his right to remain silent. The trial court so found, and we ask this Court to uphold the ruling of the trial court.

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[62] S.A. at 59.

[63] J.A. at 59.

[64] J.A. at 39.

[65] S.A. at 57.

[66] J.A. at 50.

[67] S.A. at 65-66.

CONCLUSION

For all of the above-stated reasons, respondent respectfully requests that this Court affirm the judgment of the Arizona Supreme Court.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1979

ROBERT EDWARDS, *Petitioner,*

v.

THE STATE OF ARIZONA, *Respondent.*

On Writ of Certiorari to the Arizona Supreme Court

SUPPLEMENTAL BRIEF FOR RESPONDENT

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ARGUMENT

The Record Shows That Petitioner Made an Intelligent, Knowing, and Voluntary Waiver of His Right to an Attorney.

Petitioner, in Argument II of his brief, contends that a waiver of the Sixth Amendment right to counsel must be judged by a different standard than a waiver of the Fifth Amendment right to remain silent. The Second Circuit, in the recent case of *United States v. Mohabir,*[1] held that, once a person has been indicted and the Sixth Amendment right to counsel has attached, the government must meet a higher standard to show a waiver of the right to counsel than it must meet to show a waiver of the right to remain

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[1] 624 F.2d 1140 (2d Cir. 1980).

silent.[2] In order to meet this higher standard, the government, in addition to giving the *Miranda* warnings,[3] must inform the person that he has been indicted, explain to the person what it means to be indicted, and inform the person of the nature and importance of the Sixth Amendment right he is giving up.[4]

Respondent submits that this holding does not apply to the present case for several reasons. In *United States v. Duvall*,[5] the Second Circuit held that the right to counsel did not attach upon arrest pursuant to a warrant obtained by the filing of a complaint.[6] It noted that the principal function of a complaint is to obtain an arrest warrant.[7] It therefore held that, in the period after a complaint has been filed and before an indictment is returned, all the government needs to show is a waiver of the *Miranda* rights.[8] In the present case, petitioner made his confession after the police had filed a complaint, but before the state had obtained an indictment. Under the reasoning in *Duvall*, the state would not have to meet the "higher standard" required by *Mohabir*.

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[2] 624 F.2d 1146, 1148, 1151; *accord, Carvey v. LeFevre*, 611 F.2d 19 (2d Cir. 1979), *cert. denied*, _____ U.S. _____, 100 S.Ct. 1858, 64 L.Ed.2d 276 (1980). This reasoning stems from the dissent by Judge Friendly in *United States v. Massimo*, 432 F.2d 324, 327 (2d Cir. 1970), *cert. denied*, 400 U.S. 1022 (1971).

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] 624 F.2d at 1149, 1151. The court went on to hold that it would not be sufficient for the government agents or the prosecuting attorney to give these warnings; the higher standard could be met only if a magistrate gave them. 624 F.2d at 1153. This was not a constitutional requirement, but was instead done in an exercise of the court's supervisory powers. *Id.*

[5] 537 F.2d 15 (2d Cir.) (Friendly, J.), *cert. denied*, 426 U.S. 950 (1976).

[6] 537 F.2d at 22.

[7] *Id.*

[8] 537 F.2d at 20-22.

Moreover, the other circuits have not followed the Second Circuit in adopting this "higher standard" for post-indictment statements. The First Circuit, in *United States v. Payton*,[9] held that it need not decide whether and to what extent to adopt the position of the Second Circuit because, in that case, the defendant had been told that he had been indicted.[10] It had previously held, in *United States v. Monti*,[11] in a situation where the defendant had been arrested and arraigned, and had an attorney appointed to represent him, that the *Miranda* warnings were sufficient to allow the confession to be admissible.[12] The Third[13] and Seventh[14] Circuits have held that the government must meet a "higher standard" once the defendant has been appointed counsel, but have not applied this rule prior to the appointment of counsel. The Sixth,[15] Eight,[16] and Ninth[17] Circuits have held that a waiver of the *Miranda* rights is sufficient to allow admission of a confession obtained after the defendant was indicted, and after the defendant had been arraigned and appointed counsel. The Fifth Circuit,[18] without deciding whether the Sixth Amendment right to counsel attached, held that a waiver of the *Miranda* rights was sufficient to

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[9] 615 F.2d 922 (1st Cir. 1980).

[10] 615 F.2d at 924.

[11] 557 F.2d 899 (1st Cir. 1977).

[12] 557 F.2d at 904.

[13] *United States v. Cobbs*, 481 F.2d 196 (3d Cir.), *cert. denied*, 414 U.S. 980 (1973); *see United States v. Crook*, 502 F.2d 1378 (3d Cir. 1974).

[14] *United States v. Springer*, 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972); *see United States v. Durham*, 475 F.2d 208 (7th Cir. 1973).

[15] *Arrington v. Maxwell*, 409 F.2d 849 (6th Cir.), *cert. denied*, 396 U.S. 944 (1969).

[16] *Moore v. Wolff*, 495 F.2d 35 (8th Cir. 1974).

[17] *United States v. Mandley*, 502 F.2d 1103 (9th Cir. 1974); *Coughlan v. United States*, 391 F.2d 371 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968).

[18] *United States v. Brown*, 569 F.2d 236 (5th Cir. 1978) (en banc).

waive any Sixth Amendment rights. The Tenth Circuit[19] has held that obtaining a confession from a defendant who has an attorney is an ethical violation, but not a constitutional one. In light of this lack of authority to support the "higher standard" rule of the Second Circuit, respondent asks this Court to hold that a waiver of the *Miranda* rights is sufficient to waive the rights under the Sixth Amendment. This is because the warnings required by *Miranda* include both the right to remain silent and the right to an attorney. Waiver of these two rights should be all that is needed for a confession to be admissible.

Finally, even under the "higher standard" rule of the Second Circuit, petitioner's confession would be admissible because petitioner knew all of the things that the Second Circuit requires. When Sergeant Bunting arrested petitioner, he advised petitioner of the charges against him and showed him a copy of the arrest warrant.[20] On four different occasions,[21] the officers advised petitioner pursuant to *Miranda* that he had the right to an attorney. Petitioner knew that the state was going to prosecute him for murder as shown by his asking to make a deal and asking to talk to the prosecuting attorney.[22] Petitioner stated that he had been around and knew what was going

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[19] *United States v. Thomas*, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973).

[20] J.A. at 101-02.

[21] J.A. at 20 (by Officer Allen at the time of arrest); J.A. at 45, 102, 111 (by Sergeant Bunting upon arrival at the police station); J.A. at 33, 45, 104, 111 (by Sergeant Bunting prior to the taped statement); J.A. at 57, 123, 141 (by Detective Marmion prior to the oral confession).

[22] J.A. at 36, 39, 40, 44, 107, 111.

on.[23] Finally, petitioner represented himself through two trials. The record shows that petitioner knew that he was entitled to an attorney and knew what an attorney could do for him, and made an intelligent, knowing, and voluntary waiver of this right.

CONCLUSION

For all of the above-stated reasons, respondent respectfully requests that this Court affirm the judgment of the Arizona Supreme Court.

Respectfully submitted,

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[23] J.A. at 39. On April 6, 1972, petitioner was arrested for robbery in Arizona. He was convicted and sentenced to a term of 5 to 6 years in prison. On February 27, 1974, he was paroled. On November 10, 1975, petitioner was arrested for attempt to assault a mailman. 18 U.S.C. § 2114. He was tried and found not guilty on January 13, 1976. In *United States v. Lord*, 565 F.2d 831 (2d Cir. 1977), the Second Circuit held that the government had met the "higher standard" because the defendant had been arrested on three previous occasions, and was familiar with his rights. 565 F.2d at 840. In *United States v. Diggs*, 497 F.2d 391 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974), the Second Circuit found a valid waiver noting that the defendant had been advised of his rights at least three times and had been arrested more than 21 times. 497 F.2d at 393 and n.2.

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

SUMMARY OF ARGUMENT

The State's references to various record matters are substantially in error. The State contends that Edwards never told any detective that he wanted an attorney before he would make any statement. That is wrong. Other errors of fact exist. The State tries to draw inferences about Edwards' intentions which are illogical and unsupportable. For example, the State argues that by giving a verbal statement to the interrogating police, but refusing to give a written one, Edwards was engaged in a plan to manipulate the prosecutorial system. Supposedly, he was making a statement with built-in deniability. This makes no sense. Either he would have made a voluntary statement or not.

There are incomplete and misleading quotations from, and discussions about, *Miranda* v. *Arizona,* 384

U.S. 436 (1966), *Michigan* v. *Mosley,* 423 U.S. 96 (1975). Cases from the Courts of Appeal, which discuss what was intended in *Miranda,* are incorrectly quoted. The product of these erroneous discussions is the State's argument that there should be no differing treatment between the two situations, of an accused asking for counsel, or simply staying silent. Such a holding would unnecessarily confuse the meaning of *Miranda,* and would ride roughshod over this Court's previous recognition that an accused who asks for counsel really cannot deal with the State, and ought not to be reinterrogated until he gets the assistance that he needs and is entitled to.

The State's arguments also fail to appreciate the import of the fact that the interrogation at issue was conducted after formal prosecution had commenced, and that the Sixth Amendment right to trial counsel's assistance existed. Therefore, the State mistakenly argues that police investigative considerations ought to be weighed against the Sixth Amendment right to counsel, when in fact investigation was not at issue. It also mistakenly argues that the police ought to be able to urge an accused to change his mind and not avail himself of his right to assistance of counsel, when of course the accused has already decided that he wants a lawyer to act for him and be with him in all critical stages after prosecution has commenced, including interrogation by police. The State's Brief also fails to recognize the high standard of waiver, required by *Johnson* v. *Zerbst,* 304 U.S. 458 (1938), if waiver is at issue here; and it presents no facts nor argument that could support a finding that *Johnson's* waiver standards were met.

ARGUMENT

I

Errors of Fact in The State's Brief.

A number of factual errors permeate the State's Brief, allowing the State to bolster its legal arguments both subtly and impermissibly. The more glaring of these errors are the contention that Edwards never clearly said that he wanted an attorney before he would speak to the police, and the claim that no interrogation occurred on the morning before Edwards' court appearance.

Strangely, the State never mentioned the fact that the police timed their interrogation to beat that court appearance at which Edwards would get counsel, nor did it attempt to justify that, except to say that police investigative functions would be jeopardized by prohibiting interrogations that are intended only to elicit trial evidence. That contention is dealt with in Argument III below.

Another factual error that pervades the State's Brief is the rather ludicrous argument that Edwards responded to the police interrogation on the morning of his arraignment with the purpose of "manipulating the judicial system", by making a statement that he could later deny having given. The State argues that such a manipulation demonstrates a knowing and intelligent waiver of the right to counsel, a contention with which we deal in Argument III below. Such a claim is illogical and can be squared neither with the concept of a voluntary confession nor the intentional relinquishment of the right to counsel. If the statement was voluntary, Edwards had no need to disavow it in the future. If it was not, it is inadmissible.

Some of the factual errors made by the State are:

On pages 5-6 of the Respondent's Brief[1], the State says, "At no time did Edwards say to Sgt. Bunting or any of the other officers that he would not talk to them until he spoke to an attorney." And see R.B. 28. This is clearly belied by the record.[2] The trial court found "that Mr. Edwards intended to have an attorney and intended not to make any statement until he was represented by counsel." J.A. 1. In Bunting's own words:

> "I remember the county attorney's office. When no deal was made you [Edwards] left stating, 'I'm going to wait until I get an attorney to make a deal for me. I'm not going to make a deal now. *I'm not going to make a statement now. I'm going to wait until I get my attorney.' That's the way it was left.* That's all the discussion we had about it." J.A. 151. (Emphasis added.)

The same understanding by Bunting that Edwards would wait until he got an attorney, both for a deal and to make a statement, permeates Bunting's testimony, J.A. 38-41.

At page 27 of the State's Brief, it is asserted that on the day Edwards was arrested he was "informed of his rights three times: At the time of his arrest . . ." This is simply

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[1] Hereinafter cited as R.B., with page number.

[2] The Arizona Supreme Court unequivocally found that Petitioner had asserted his right to counsel the evening of the interrogation by Sgt. Bunting. See J.A. 16:

> "We hold, therefore, looking at Edwards' statement in the context made, that although it was equivocal, its meaning was sufficiently clear and, therefore, it must be interpreted as a request for counsel, and as a request to remain silent until counsel was present".

false. (See J.A. 13 — Arizona Supreme Court Opinion: "Edwards was arrested at his home at 4:00 o'clock p.m. He was not read the Miranda warnings at that time . . ."; J.A. 31 — answers by Detective Bunting: "Q. At the time he was arrested did you go over his Miranda rights with Mr. Edwards? A. Not at the moment of arrest. Later at the police station"; J.A. 45 — Answers by Detective Bunting: "Twice he was advised." See also, J.A. 18.) Having made this error in its statement of facts, the State proceeds to build its argument upon the erroneous contention that Edwards waived his rights on the 20th, because he had been given his rights on several separate occasions.

The clearest factual error is the contention, R.B. 22, that no interrogation of Edwards occurred on the morning before he was to be arraigned. *Rhode Island* v. *Innis*, ____ U.S. ____ (1980), is the supporting citation, and no doubt the inspiration, for the argument. Such a contention is untenable. The record in this case is replete with evidence that Detectives Marmion and Milne fully intended to elicit incriminating responses from the Petitioner.[3]

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[3] See, for example,

"I had one thing on my mind, to go out there and question him about his murder, and see what he was willing to say." J.A. 52 (by Marmion).

"Detective Marmion was going out to interview Mr. Barefield and I accompanied him", "Detective Marmion interviewed Mr. Edwards." J.A. 141 (by Milne).

"Q. Is there any reason why two rather than one detective went to the Pima County Jail to talk to Mr. Edwards?

A. Well, I wasn't going to the jail for the purpose of talking to Mr. Edwards. I was going to the jail for the purpose of just being a witness to any statements that he made.

At page 6 of its Brief, the State says that Sergeant Bunting assigned Detective Milne to go along with Detective Marmion to the interrogation of Edwards "as part of Detective Milne's educational process." Although Milne did say that accompanying Marmion was "an educational process for myself", J.A. 140-41, there was no testimony that he went to the jail for an education. The State's attempt to persuade this Court that Milne's presence was fortuitous, in an effort to show that the trip to the jail was not for interrogation, is frivolous. Marmion deliberately set out to obtain a statement from Edwards. Milne went along as a witness. (J.A. 68 — by Milne, "I was going to the jail for the purpose of just being a witness to any statements that [Edwards] made.") The Tucson police detectives were not on an educational sojourn to the jail; nor were they investigating the crime. Rather, they were

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Q. The express purpose then, at least as far as you knew, of going to the jail that day was to obtain a statement.

A. Was to interview Mr. Barefield with the obvious — *obtaining the statement would be obvious.*" J.A. 68 (by Milne). [Emphasis supplied.]

"Q. After you played that portion of Mr. Soto's statement, did you ask Mr. Edwards some questions about the La Conga Bar incident?

A. We did." S.A. 25 (by Marmion)

These cites from the record clearly establish that it was the full intention of the police to interrogate Mr. Edwards when they went to the jail that morning.

deliberately attempting to obtain a confession for use at Edwards' trial, and to do so before the Defendant even had an opportunity to have counsel appointed for him. To characterize Milne's presence as part of an "educational process" paints a false picture of what occurred on the morning of January 20.

The State implies disbelief of Petitioner's testimony that when Marmion wanted to interrogate him on January 20th, Edwards told the detention officer that he did not want to talk to the detectives (R.B. 29). The State went to great pains to dispute any other portions of Edwards' testimony that it could. For example, it recalled various detectives to testify how late the evening before Edwards was taken to the jail (J.A. 90). It did not bother to present any such testimony on this subject. Although the trial court did find the testimony of the arresting officers to be credible as compared to that of Edwards in those areas where there was a conflict, his testimony that he did not want to leave his cell when requested to do so by the detention officer stands uncontradicted. Rather than being reluctantly admitted facts as the State would have it, both courts below agreed that Edwards did not want to be reinterrogated, but was told that he must visit with the officers. Justice Gordon, in his dissent, accepted this testimony, and the trial court also concluded that the officers, and not Edwards, instituted the reinterrogation on the morning of the 20th.

The State would also have this Court believe that Edwards was engaged in a carefully thought out strategy, aimed at affording him the opportunity to make a statement and later deny that he had done so. It did so

partly on the basis of psychiatric testimony as to which the State itself objected, and which objection the Court sustained! Tr. March 24, 1977, pp. 4-6, 4-7. But it is difficult to conceive of Edwards, as to whom that psychiatrist reported intelligence levels "in the borderline of dull-normal intelligence",[4] concocting a grandiose scheme "to manipulate [the judicial system] to his advantage" (R.B. 31) in the course of an overnight stay in the Pima County Jail and in the grips of the frightened mental turmoil that would inevitably follow from an arrest for murder.

Another aspect of the so-called scheme to manipulate the system to his advantage is the assertion by the State that Edwards at some times denied having made the statement as to which Marmion testified. As we have previously indicated (Opening Brief, p. 55, n. 38), the manner by which the prosecutor questioned Edwards at the suppression hearing engendered confusion about whether a "statement" was taken from Edwards, as opposed to whether Edwards made verbal statements to the officers. By that time, Edwards' wit and intellect had been daunted by a year's incarceration in the County Jail, which, in the psychiatrist's opinion, had dulled Edwards' ability to think.[5] Furthermore, the State's contention that

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[4] In the record, see the Report of Dr. David Gurland, December 13, 1976.

[5] Tr. March 24, 1977, pp. 4-5. It is not surprising that spending a year in the Pima County Jail dulled Edwards' mental faculties. Like many, this jail has been held to be overcrowded, to constitute unconstitutional punishment in pretrial detention, and to impose

Edwards argued at trial that he had made no statement on the 20th is contradicted by its own record-cited reference, which shows that, in his unschooled words, he was asking the jury to consider if the statement was "with voluntarily made". S.A. 65, 66.

Simply put, the State's argument that Edwards intentionally made a statement and then structured subsequent events in order to manipulate the system makes no sense. Edwards may well have felt it psychologically necessary to relieve the police imposed pressure to give a statement by giving one, but his adamant refusal to allow that statement to be taped demonstrates clearly that he did not understand the consequences of speaking. Once in the interrogation room Edwards may have agreed to talk with the detectives, but it certainly is ludicrous to contend that he did so as part of some bizarre design to defend himself by making a statement he could later claim did not exist.[6]

II

Errors By The State in Discussing *Miranda, Mosley,* And Case Law From The Circuit Courts Of Appeal.

The State stubbornly refuses to accept the fact that this Court, in *Miranda* and *Mosley,* has established different

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privations, hardships and risks of violence upon those who are jailed. *Erickson* v. *Dupnik,* Civ. No. 78-008-TUC-MAR (D. Ariz. 1980). This Court can, of course, judicially notice such a judgment of the District Court in the state from which Edwards' case was brought. Federal Rules of Evidence 201; *Gilmore* v. *City of Montgomery,* 417 U.S. 556 (1974).

[6] In fact, assuming the State is correct — that Edwards conjured up such a scheme, it is questionable whether the plan would materially

rules for custodial interrogation of an accused who asks for counsel, than it has for one who simply decides to remain silent. Similarly, the treatment in its brief of lower court cases on the subject misstates the law in the area.

The State argues[7] that neither *Miranda* nor subsequent cases of this Court interpreting it, distinguish between the situation of an accused claiming his right to be silent and that where he asks for the assistance of counsel, as to limitations upon the right of police to conduct reinterrogations. The argument is founded upon a selectively misleading quotation from the *Miranda* opinion. The State simply left out of its brief the paragraph, 384 U.S. at 474, which said that police cannot reinterrogate a suspect who has asked for an attorney until they provide him one. The paragraph is one of three that have been quoted over and over again by this Court, but an understanding of the error made by the State requires that the section of *Miranda* be requoted here. As extracted by the State of Arizona in its Brief, page 18, the *Miranda* quotation is:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any

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aid him in front of a jury. Certainly, if such a plan existed, it is another in a plethora of indications that Edwards did not comprehend the effects of speaking without advice of counsel.

[7] R.B. 18, 19.

statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

* * * * *

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." R.B., page 18, citing *Miranda* v. *Arizona, supra.*

The State then notes, page 19, that the passage "does not say that the interrogation may not resume under any other circumstances [other than when an attorney is present]." But, the omitted paragraph of the opinion, represented by the above ellipsis in the State's Brief, says:

> "This does not mean, as some have suggested, that each police station must have a 'stationhouse lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege *so long as they do not question him during that time.*" 384 U.S. at 474. (Emphasis supplied.)

The State next characterizes this Court's holding in *Michigan* v. *Mosley,* 423 U.S. 96, in a way that refers to the bobtailed *Miranda* quotation in its Brief, in the following terms:

> "This Court then held that the passage did not create a '*per se* proscription of indefinite duration upon any further questioning by any police officer on any subject . . .' 423 U.S. at 102-103." Brief, page 18.

Again the elided material demonstrates the error. The rest of the sentence consists of the qualifier, contained at page 103 of 423 U.S., "once the person in custody has indicated *a desire to remain silent.*" (Emphasis supplied.)

By careful selection, the State has argued that what was intended in *Miranda* and *Mosley* to refer to the situation where an accused has chosen to remain silent, also allows reinterrogation after the accused has asked for an

attorney. This Court has clearly stated otherwise. *Michigan* v. *Mosley, supra,* 423 U.S. at 104 n.10 (*Miranda* "distinguishes between the procedural safeguards triggered by a request to remain silent and a request for an attorney, and directs that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney' "); *id.,* at 109 (White J., concurring) ("The Court showed in the very next paragraph [the one omitted by the State of Arizona] that, when it wanted to create a per se rule against further interrogation after assertion of a right, it knew how to do so."); *Fare* v. *Michael C.,* 442 U.S. 707, 719 (1979) ("the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease"). In short, this Court has understood the distinction, even if the State has not. But the State's misreading of the law does not stop with this Court's decision.

Both in the discussion of its own authorities on the subject, and its analysis of the cases cited by Edwards in the Opening Brief, the State misstates the status of the law among the Circuit Courts of Appeal on whether an accused can be reinterrogated after he asks for a lawyer.[8]

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[8] The State's Brief is strangely silent on the authorities, from the various states cited in the Opening Brief, recognizing a rule against reinterrogation of a suspect who asks for counsel. Opening Brief, page 20, n. 12, page 23, n. 14.

The State cites *U.S.* v. *Hauck,* 586 F.2d 1296 (8th Cir. 1978), *cert. denied,* 441 U.S. 947 (1979), and *Cobbs* v. *Robinson,* 528 F.2d 1331 (2d Cir. 1975), *cert. denied,* 424 U.S. 947 (1976), for the proposition that those circuits which have "addressed this issue have held that there is no such per se rule" (R.B. 10-11). Neither case mentions a per se rule at all.[9]

The State similarly misapprehends the cases cited by Edwards in his Opening Brief. As much is evident from the statement, R.B. 14, that "the cases cited by Petitioner do not lend support for his position. They address the situation where a suspect requests an attorney, but the police continued questioning the suspect in spite of the request." The quoted assertion by Arizona applies quite precisely to what happened to Edwards: He asked for an attorney, but they kept on questioning him the next morning.

And, the misapprehension borders on plain misstatement. For instance, at R.B. 15, the Respondent says that

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[9] In *Cobbs,* the defendant called his grandmother instead of a lawyer when given the opportunity to use a phone. The Second Circuit held this to be an abandonment of the right to counsel, 528 F.2d at 1342. Petitioner concedes (Brief, p. 17) that intentional delay on the part of a criminal suspect in obtaining or seeking the advice of counsel may justify further interrogation. But, in the case at bar, Petitioner had never had a chance to obtain counsel. In *Hauck,* the defendant "affirmatively withdrew his request for counsel before the interview continued." 586 F.2d at 1298. This holding is in line with Petitioner's contention that only defendant-initiated waiver may be allowed.

Thompson v. *Wainwright,* 601 F.2d 768 (5th Cir. 1979), "does not say that there could not be a subsequent knowing and intelligent waiver of counsel; it merely says in that case there was none." To the contrary:

> "The more troublesome issue in this case is whether officers Cunningham and Latham violated the per se rule, established in Miranda and well recognized in this circuit, that requires all custodial interrogation to cease once the suspect asks for an attorney." 601 F.2d at 770-71.

Similary, respondent claims that *U.S.* v. *Priest,* 409 F.2d 491 (5th Cir. 1969), does not address the issue now before the Court, "that is, whether there can be a subsequent waiver of the right to an attorney once the suspect has requested one." R.B. 17. *Priest,* however, clearly states:

> "Where there is a request for an attorney prior to any questioning, as in this case, a finding of knowing and intelligent waiver of the right to an attorney is impossible." 409 F.2d at 493.

The State also claims that *United States* v. *Blair,* 470 F.2d 331 (5th Cir. 1972), *cert. denied sub nom Crews* v. *United States,* 411 U.S. 908 (1973) did not address the waiver or "per se" issue. But it did, emphasizing with italics *Miranda's* instruction that, if the Defendant asks for a lawyer, "interrogation must cease until a lawyer is present" and "there can be no questioning", 470 F.2d at 338. To the Government's rejoinder of a claimed waiver, the court said "[T]his circuit has squarely faced and rejected the Government's theory on several previous occasions." *Ibid.*

In sum, if *Miranda* is to be given a logical application, consistent with its constitutional purpose,[10] this Court should decline the State's invitation to blur the distinction between those who claim their right to counsel, as to whom reinterrogation is disapproved, and those who choose to remain silent, where reinterrogation may be permitted if the suspect's right to remain silent is scrupulously honored.

III

The State's Misapprehension Of The Distinction Between The Right To Counsel And The Privilege Against Self-Incrimination, And Its Incorrect Conclusion Concerning Waiver Of Sixth Amendment Rights To Counsel

The State of Arizona has not deigned to tackle this Court's distinction between situations where counsel is requested and those in which the right to silence is invoked. It has not disagreed with this Court's reasoning, cited in our Brief, p. 16, that a claim of the right to counsel is different because the accused has acknowledged his inability to deal with the police. Instead, the State turns, as did the Arizona Supreme Court, to the assertion that this Court's statement of concern in *Mosley, supra,* about rules that would provide "wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessment of their interests", applies in this case.

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[10] "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda,* disparage it, nor extend it at this late date". *Rhode Island* v. *Innis,* ____ U.S. ____, ____ (1980) (Burger, C.J., concurring).

Mosley, of course, spoke to situations where the accused decides to remain silent, and not where he asks for counsel. But, in any event, those concerns are inapplicable to the situation posed by this case.

The State's argument is that a per se rule, or even one allowing only defendant-initiated interrogation, would wrongfully prevent a criminal suspect from changing his mind when he has once chosen to request the assistance of counsel in his defense. Especially if defendant-initiated reinterrogations are allowed, this assertion is untenable. The State apparently bases its argument[11] on the view that the police should be allowed to present evidence to an accused in order to fill him in on the state of the case against him, so that he may make a rational and informed decision as to whether to remain resolute in his desire to consult an attorney. Surely, Edwards was not in a position to evaluate the evidence from a legal standpoint in the way his lawyer could have. It is hard to conceive of any aspect of his overnight stay, in isolation in a sordid jail, that better equipped Edwards to reconsider his decision of the day before that he needed a lawyer to help him deal with the State's charges and its interrogation of him. It hardly requires detailed recitation of the fear, loneliness, and sensory deprivation that resulted from Edwards' jailing after his arrest for murder, to recognize that any statement obtained on January 20 was theproduct of subtle coercion caused by custody. It was not the result of a "rational and

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[11] See R.B. 21-23.

informed" change of mind about the need for a lawyer. When a suspect is to be appointed counsel in a matter of hours and has repeatedly asserted his rights to a lawyer and to silence (illustrating his self-determined conviction that he does not want to stand alone against the State), it is absurd to argue that presenting evidence to him, after such an interlude in jail, will aid his decision more than would presenting the evidence to his lawyer several hours later.

The State contends that prohibiting reinterrogations after an accused asks for counsel would hamper investigative processes. But criminal prosecution had already been commenced against Edwards.[12] This case does not concern investigative processes. It concerns the conduct of the authorities toward a criminal defendant after commencement of prosecution, and their attempts to secure a conviction before actual trial had begun. This is an extremely important distinction. There is a vast difference between attempting to ascertain the identity of the perpetrator of a crime, on the one hand, and admittedly endeavoring to secure incriminating statements from a criminal defendant who, having been formally charged, is in custody, with the entire focus of the State's "trial preparation" techniques trained on him. While this Court properly considered in *Mosley, supra,* the effect upon investigative activities of a per se rule against

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[12] See R.B. 24, n. 47, where the State acknowledges "that Petitioner's right to an attorney existed from the moment he was formally charged by the State on January 19, 1976."

reinterrogating an accused who chooses to remain silent, that concern is lacking here, and the Arizona Court's citation to *Mosley's* statement as if it applied letter-for-letter to a deprivation of the right to counsel is inapposite.[13]

The State's waiver analysis is also simplistic. Because of the difference between situations after prosecution has commenced, where the right to counsel implicit in a fair trial is involved, and those beforehand, where investigative interrogations are common and the Fifth Amendment rights are being protected, a higher standard of waiver unquestionably applies. The closest the State has come to recognizing this is its contention, R.B. 26, that *Brewer* v. *Williams,* 430 U.S. 387 (1977), holds that such a right to counsel can be waived. In fact, this Court simply said in *Brewer* that it was not reaching the question whether the right to counsel could be waived without notice to counsel; it said only that Williams did not waive his right to counsel, reserving the question of whether he could ever do so. *See, id.,* 430 U.S. 405-06. The State mutilates this statement into a rule that waivers of Sixth Amendment trial counsel rights can always be made.

Not quarreling with the proposition that interrogating an accused who has a right to counsel before counsel can attend is improper, unethical, and perhaps unconsitutional, the State merely says that Edward is precluded

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[13] As we have already noted, there are, of course, additional distinctions between *Mosley* and this case, founded upon the significance of an accused asking for a lawyer's help, rather than simply choosing to be silent.

from raising this point. The issue is properly framed. First, the admissibility of the confession, because of the hurried interrogation before arraignment, was raised and passed upon on Sixth and Fourteenth Amendment grounds by the lower courts below.[14] Moreover, it makes no difference whether the language of cases talking about ethical violations and violations of fundamental fairness have previously formed part of the arguments in this case, for this Court's rule is well-settled that an issue is not precluded if it is "an enlargement of" that presented to the state court or if it is "so connected with it in substance as to form but another ground or reason" that the same constitutional claim should be recognized. *Dewey* v. *City of Des Moines,* 173 U.S. 193 (1899). Here, the same Sixth and Fourteenth Amendment rights to counsel and to due process generally are being asserted before this Court as were raised below. Additional cases have developed additional but integrally related reasons for this Court to conclude that a violation of either the right to counsel or due process occurred. *See* P.B. at 45 (ethical propriety of interrogation should form part of definition of due process).

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[14] The trial court expressly considered the case of *State ex rel Berger* v. *Superior Court,* 105 Ariz. 553, 468 P.2d 580 (1970), J.A. 93, which deals with the right of police to interrogate one who is entitled to counsel, without telling appointed counsel they are doing so. Of course, the issue was squarely before the Arizona Supreme Court, by virtue of Justice Gordon's dissent which said "I cannot condone the tactics of the investigating detectives . . . knowing that an attorney would not be appointed for him until the afternoon", J.A. 30.

For these reasons, police activity, which may pass muster when judged relative to a suspect's Fifth Amendment rights, may not comport with the more stringent requirements surrounding a suspect's Sixth Amendment right to counsel in criminal proceedings. *Carvey* v. *LaFever,* 611 F.2d 19 (2d Cir. 1979).[13] Not only are courts more stringent in forbidding interference with a suspect's Sixth Amendment rights, they place a higher burden on the State if a waiver of such rights is sought to be shown. *Id.; United States* v. *Satterfield,* 558 F.2d 655 (2d Cir. 1976).

The State has not met the heavy burden placed upon it to prove that Petitioner knowingly, intelligently and understandingly waived his Sixth Amendment right to counsel. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938). The trial court never found that Petitioner had waived his Sixth Amendment rights. If the Arizona Supreme Court made such a finding, it was only by implication and was

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[13] The State made an interestingly selective use of *Carvey* v. *LeFever* at R.B. 24. First, it argued that Carvey stands for the proposition that the Sixth Amendment right to counsel can be waived. In the very next paragraph, it argues that the waiver of Fifth and Sixth Amendment rights to counsel are to be judged similarly. *Carvey* does support the State's first contention here, a point with which we disagree. But continues:

> "What might suffice to comply with Miranda will not necessarily meet 'the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached.' " 611 F.2d at 22.

based on the erroneous use of the standard of *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973), not *Johnson* v. *Zerbst.*[16] *Schneckloth* promulgated the standard applicable to determining the voluntariness of Fourth Amendment consents. It held that a court should look at the totality of the circumstances, and that knowledgeof the right was only one factor to be considered. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 226-27. But, in the same opinion, it was recognized that *Johnson* v. *Zerbst* set the standard for the waiver of the Sixth Amendment right to counsel, to be "an intentional relinquishment of a known right or privilege." 412 U.S. at 236-37. The Arizona court applied the first standard, which actually relates only to the Fourth Amendment. It did not apply the standard it should have, that arising from *Johnson* v. *Zerbst* and the Sixth Amendment. Significantly, Justice Gordon's dissent recognizes that the majority did not apply the correct standard and that the facts of the case would not fulfill the *Johnson* v. *Zerbst* test. *See* 122 Ariz. at 217, 594 P.2d at 83 (Gordon, J., dissenting).

The facts which the State offers as proof of Petitioner's waiver of the right to counsel are relevant only, if at all, to a waiver of the right to remain silent. Arguments to the effect that Petitioner was warned, supposedly four times, about making a statement (R.B. 30) and that a psychiatrist

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[16] The Arizona Supreme Court cited to that section of *Schneckloth* in which Mr. Justice Stewart was rejecting the notion that a person must be advised of his right to refuse consent to a search before any consent could be considered voluntary.

testified that Petitioner could understand that anything he said would be used against him (R.B. 31) are not relevant to whether Petitioner waived his Sixth Amendment rights to counsel. Neither are arguments concerning the absence of coercion from solitary confinement (R.B. 28). These argument go toward the voluntariness of the giving of a statement under Miranda, not the understanding or intelligent nature of an alleged waiver of counsel under *Brewer* v. *Williams,* 430 U.S. 387 (1977), or *Massiah* v. *United States,* 377 U.S. 201 (1964). To make that leap requires a feat of nonsequitur logic that simply does not work.

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